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CASES DETERMINED

IN THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS,

OF THE

STATE OF MISSOURI,

FROM MAY 25, 1891, TO NOVEMBER 10, 1891.

REPORTED BY

DAVID GOLDSMITH, of the St. Louis Bar,

AND

BEN ELI GUTHRIE, of the Macon City Bar,

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HON. SEYMOUR D. THOMPSON, } *Judges.*
HON. WILLIAM H. BIGGS, }

JOHN LEWIS, *Clerk.*
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JUDGES OF THE

KANSAS CITY COURT OF APPEALS.

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CASES DETERMINED

BY THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS.

MARCH TERM, 1891.

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WILLIAM D. BROWN, Defendant in Error, v. HENRY C. MILLER, Plaintiff in Error.

Kansas City Court of Appeals, May 25, 1891.

1. **Married Women:** POSSESSION OF WIFE'S REALTY: TERMINATION OF AGENCY. A woman is married on one day and her agent leases her land on the next day. Such lease conveys nothing, as the possession belongs to the husband and the marriage terminates the agency.

2. ——— : ——— : CONVEYANCE OF WIFE'S REALTY: DEED: ESTOPPEL. Under the statute, the sole deed of the husband will not answer even to convey his marital right of possession in his wife's realty. An estoppel *in pais* can never operate to prejudice the rights of the person estopped, except when the sole deed of such person would have a similar operative effect.

3. **Injunction:** WASTE: EVIDENCE. The evidence in this case *held* to support a finding that there was imminent danger of the commission of waste, and justified the granting of an injunction.

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Appeal from the Caldwell Circuit Court.—Hon. J. M. Davis, Judge.

Affirmed.

Crosby Johnson, for plaintiff in error.

(1) Except as to her separate estate a married woman can have no agent. *Wilcox v. Todd*, 64 Mo. 390; *Hall v. Callahan*, 66 Mo. 316. (2) The land involved in this case was not the separate property of Mrs. Brown; but after her marriage her husband became entitled to possession thereof. *Dyer v. Wittler*, 89 Mo. 81. (3) Marriage of Mrs Brown revoked the authority of Cox as her agent. Ewell's Evans on Agency, 99. (4) In leasing the land Cox did not intend or purport to act for W. D. Brown, but for himself or Mrs. Brown. *Mill Co. v. Brundage*, 25 Mo. App. 268; Story's Agency, sec. 251 *a*. (5) As Cox was not professing or designing to act as the agent of W. D. Brown, Brown could not make an effectual ratification of Cox's acts. *Mill Co. v. Brundage, supra; Steinkamp v. McManus*, 26 Mo. App. 51. (6) In this state it is not essential that the threatened injury should be irreparable to warrant the granting of an injunction. *Harris v. Board*, 22 Mo. App. 463; *McPike v. West*, 71 Mo. 199; *Dubach v. Railroad*, 89 Mo. 483. (7) Breaking up pasture, or threatening to do so, is ground for injunction. *Wilds v. Layton*, 1 Del. (Chan.) 226; Taylor on Land. & Ten., sec. 345; *Clemence v. Steer*, 53 Am. Dec. 621. (8) Injunction will issue when waste is threatened. High on Injunctions, secs. 655-672.

Garner, Summerwell & Black and *James L. Harris*, for defendant in error.

(1) This suit can only be maintained upon the theory that the plaintiff is entitled to the possession of the premises; and that section 6868, Revised Statutes,

1889, does not take away the marital right of the husband to the possession of real estate owned by the wife at the time of her marriage; and the same is not the sole and separate property of the wife. (2) Defendant insists that if the husband is entitled to the possession of this property under said section 6868, and is thus entitled to bring this action, the conduct of the plaintiff has been such as to ratify such lease and to estop him in this an equitable action to enjoin defendant from disputing the validity thereof. 25 L. A. 297; *Chandler v. Jost*, 81 Ala. 412; R. S. 1889, sec. 5186, p. 1257; Hill on Injunctions [3 Ed.] p. 33; 2 Story's Eq. Juris., p. 33; *Skrainker v. Ortell*, 14 Mo. App. 481.

GILL, J.—This is an injunction suit brought by plaintiff Brown to enjoin defendant Miller from entering upon, plowing up the grasses and cutting and destroying the timber of a certain three hundred acres of land, the title of which is vested by ordinary conveyance in plaintiff's wife. The circuit court heard the case on petition, answer and reply, with evidence tending to sustain the claims of plaintiff and defendant respectively, and gave judgment for the plaintiff, awarding the relief prayed for. Defendant appealed.

The circumstances giving rise to this litigation may be substantially stated as follows: On October 10, 1888, plaintiff was married to Mary Catron, who then owned as general property the three-hundred-acre farm. Miss Catron's interest in this farm had been theretofore looked after by one John D. Cox; and as her agent, and without knowledge of her marriage, Cox, on October 11, 1888, entered into a written contract of lease of the farm to defendant Miller, the term to begin March 1, 1889, and ending March 1, 1890. Said lease was signed by John D. Cox, agent for Miss Mary Catron. The land was then occupied by Smith, whose tenancy closed with the last day of February, 1889. During the first

days of March, 1889, and before defendant Miller had taken actual possession under the lease from Cox, plaintiff Brown entered into possession of the land, and gave notice to Miller that he would not respect the alleged lease from Cox, and warned Miller not to enter the premises, etc. Miller, however, ignored Brown's warning, forced the fences, hauled some posts onto the land, and, on March 13, began the construction of a small house thereon. The farm was about equally divided into cultivating and pasture land, and a portion thereof was covered with timber. The evidence satisfactorily shows threats from Miller to plow up the grass and to cut and destroy the timber. It was at this period—when defendant Miller was invading the land, and about to erect a house thereon, and threatening injury to the premises—that plaintiff sued out this injunction, which on a final hearing was made perpetual.

I. The law and the facts of this controversy are, in our opinion, all with the plaintiff. By virtue of the marriage of Miss Catron to Brown, October 10, 1888, the plaintiff became, at that date, entitled to the possession and use of the land in question. So then the alleged lease the next day (October 11), entered into by Cox (claiming to act as the agent of Miss Catron), was a nullity. This pretended lease was void even for another reason ; admitting the former agency of Cox, the marriage of Miss Catron (his principal) had the effect to revoke such agency, and, therefore, when the lease was made on October 11, Cox had no authority whatever to represent the then Mrs. Brown. Ewell's Evans on Agency, side page 99.

II. The Cox lease then, of its own force at least, conferring no right on defendant, we come now to the next point made by his counsel. It is contended, that, admitting the invalidity of the alleged lease as made by the agent Cox, yet that plaintiff is estopped from disputing its efficacy. It is claimed that, after his marriage to Miss Catron, he, the plaintiff, received the written

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instrument with note for the rent and made no objection thereto; that he permitted defendant to work on the farm, to break stalks and to proceed in the construction of a house, etc., because of all which the plaintiff is precluded from the assertion that the defendant had no lease, etc. Now in the first place the testimony shows, that defendant broke the stalks during the month of February and while the former tenant occupied the premises, and that, too, without the knowledge of plaintiff—and as to expending money in constructing a house, it seems, plaintiff moved promptly on receipt of such information and by this suit enjoined defendant from proceeding therewith. However this may be, it is clear the plaintiff cannot make a lease of this farm (owned as it is by his wife) by his acts, or by an estoppel, but only in the manner pointed out by the statute. R. S. 1889, sec. 6868. The portion of this section applicable here, reads as follows: "The rents, issues and products of the real estate of any married woman * * * and the interest of her husband in her right in any real estate which belonged to her before marriage * * * shall, during coverture, be exempt * * *; and no conveyance made during coverture by such husband of such rents, issues and products, or *of any interest in such real estate*, shall be valid, unless the same be by deed executed by the wife jointly with the husband and acknowledged by her in the manner now provided by law, in the case of the conveyance by husband and wife of the real estate of the wife." Now the import of this language is clearly, to deny the power to the husband of conveying away *any interest* in the wife's real estate, even his own interest by virtue of his marital rights, except such conveyance be by an instrument of writing, jointly executed by both husband and wife. A conveyance of the interest in the wife's real estate, held by her in severalty and in the ordinary way, can only be accomplished by the joint deed of husband and wife. The soledeed of the husband

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will not answer even to convey his marital right of possession. Since then the husband's sole deed will have no such effect, it has been decided that the conduct of the husband, in the nature of estoppel, can have no such force. An estoppel *in pais* can never operate to prejudice the rights of the person estopped, except when the sole deed of such person would have a similar operative effect. *Mueller v. Kaessmann*, 84 Mo. 318; *Henry v. Sneed*, 99 Mo. 426.

The *Kanage case*, reported in 76 Mo., page 208, which is cited and relied on by defendant's counsel, is expressly overruled in *Mueller v. Kaessmann*, *supra*, and is no longer authority for the position here contended for. So then we conclude that as the year's tenancy of Mrs. Brown's farm was never carved out and conveyed to defendant as prescribed by the statute—by an instrument of writing jointly executed by the husband and wife—defendant had no right as tenant, or otherwise, to enter upon, cultivate, use or abuse the farm in question.

Upon reading the evidence adduced at the trial, we discover no reason to question the court's finding that there was imminent danger of the commission of waste by defendant at the institution of the suit. The judgment of the lower court was for the right party and is affirmed. All concur.

LOUIS A. COQUARD, Appellant, v. THE SCHOOL DISTRICT OF JOPLIN *et al.*, Respondents.

Kansas City Court of Appeals, May 25, 1891.

Public Corporations: NOT LIABLE FOR REFUSAL TO ACCEPT BID. Although a notice has been published inviting bids for corporate securities, yet the contract is incomplete until the proposal is accepted and the corporation inviting the proposal is not liable for damages for refusing to accept an offer, even though it be the highest regular offer made; much more so when the notice reserves the right to reject any and all bids.

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Appeal from the Jasper Circuit Court.—HON. M. G. McGREGOR, Judge.

AFFIRMED.

Clover & Clover and *C. H. Montgomery*, for appellant.

(1) The court erred in sustaining a demurrer to plaintiff's petition. Defendant's demurrer admits everything stated in plaintiff's petition and it undoubtedly states a cause of action. *McKinzie v. Mathews*, 59 Mo. 99. (2) The acceptance of a bid made under an advertisement for sealed proposals for constructing a public work, if the bid is regularly made and is the lowest one, creates a vested right to the contract of which the bidder cannot be deprived by subsequent legislation, without compensation. *Matter of the Protestant Episcopal School*, 58 Barb. (N. Y.) 161; Howard Pr., 139; *Beaver v. Institution for Blind*, 19 Ohio St. 97. In such case, after the day limited for the filing of proposals, and after the same have been opened, the trustees are vested with no discretion to permit an amendment or alteration of any such proposal on account of any alleged mistake therein, unless the facts of such mistake, and the requisite data for correcting the same, are apparent on the face of the proposals. *Beaver v. Institution for Blind*, *supra;* Pollock's Principles of Contracts, p. 175; *Dement v. Rokker*, 126 Ill. 189.

J. W. McAntire, for respondents.

(1) "An absolute acceptance of a proposal, coupled with any qualification, will not be regarded as a complete contract, because there at no time existed the requisite mutual assent to the same thing in the same sense." *Eads v. The City of Carondelet*, 42 Mo. 113;

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Robinson v. Railroad, 75 Mo. 494; *Lungstras v. Ins. Co.*, 48 Mo. 201; *Taylor v. Fox*, 16 Mo. App. 527; 2 Benjamin on Sales, ch. 3; 2 Sutherland on Damages, p. 354; 27 Mich. 324; 28 Mich. 205; 33 Mich. 386; 31 Ark. 155; *In Matter Saline Co.*, 45 Mo. 55; *State v. Court*, 51 Mo. 350; *Railroad v. St. Louis*, 92 Mo. 160; *Buchanan v. School District*, 25 Mo. App. 85. (2) *Matter of the Protestant Episcopal School*, 58 Barb. (N. Y.) 161, and other authorities cited under that clause of appellant's brief, are not applicable to this case. That was only a reiteration of the doctrine that the legislature could not pass a law impairing the obligation of contracts, or retrospective in its operation. In this case no such question arises.

Gill, J.—Plaintiff in his petition alleged in substance: That the defendant school district is a corporation and the other defendants compose the board of directors thereof; that on December, 1889, defendants advertised for bids for a certain number of bonds to be issued by said school district, and that sealed proposals would be received up to noon of January 9, 1890; that in said notice, or advertisement, defendants reserved the right to reject any and all bids; that plaintiff, a dealer in such securities, within the time suggested by said advertisement, did make a sealed proposal for the purchase of said bonds and did comply with all the terms and requirements of said notice, and did deposit the sum of money required for a faithful performance of his bid if the contract should be awarded him; that plaintiff was the highest bidder for said proposed bonds, etc.; but that defendant refused to award the contract for said bonds or to sell the same to plaintiff—whereupon he suffered great loss for which he asks judgment. Defendants interposed a demurrer to the petition, on the ground that no cause of action was therein stated. The circuit court sustained the demurrer; and, plaintiff refusing to amend, final judgment for defendants was entered, whereupon plaintiff has appealed to this court.

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I. The petition did not state a cause of action, and the demurrer thereto was properly sustained. There was no contract between plaintiff and defendants. Defendants simply advertised for *proposals* for a loan. They did not even say to plaintiff, "We will award the bonds to you if you are the highest bidder." By the notice bids were solicited, it is true; but on the face thereof (according to the allegations of plaintiff's petition) defendants expressly reserved the right to *reject any and all bids.*

Dillon, in his work on municipal corporations (third edition, section 470), uses this language: "Although notice has been published inviting proposals to do public work, yet the contract is incomplete until the proposal is actually accepted, and the corporation on inviting the proposal is not, it seems, liable for damages for refusing to accept an offer, even though it be the lowest regular offer made." This was said, too, in reference to published invitations to bid for public work without such a reservation as contained in defendants' notice. How much stronger will this doctrine apply where the corporation, in express terms, reserves to itself the right to reject any and all bids, as is the case here. The authorities cited by plaintiff's counsel have no application whatever to the case at bar. For cases in point see *Smith v. Mayor*, 10 N. Y. 507; *People v. Croton Aqueduct*, 26 Barb. 251; *State ex rel. Howlett v. Directors*, 5 Ohio St. 235. Judgment affirmed. All concur.

THE STATE OF MISSOURI, Appellant, v. MARY DAVIDSON *et al.*, Respondents.

Kansas City Court of Appeals, May 25, 1891.

Information: KNOWLEDGE OF AFFIANT: CURING OF AFFIDAVIT. An affidavit, furnishing the basis for an information by the state's attorney, must be on the actual knowledge of affiant: and the perfect allegation of an information will not cure the vice in the affidavit on which it is based.

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Appeal from the Hickory Circuit Court.—HON. W. I. WALLACE, Judge.

AFFIRMED.

W. D. Harryman, for appellant.

The affidavit and information were both good; both charge an offense in the language of the statutes. *State v. Parker*, 39 Mo. App. 116; *State v. McDaniel*, 40 Mo. App. 356; *State v. Hatfield*, 40 Mo. App. 358; *State v. Ferguson*, 29 Mo. 416; *City of St. Charles v. Meyer*, 58 Mo. 86; *State v. Batson*, 31 Mo. 343.

J. H. Davidson and *Karnes, Holmes & Krauthoff*, for respondents.

(1) This information is not verified as required by law. R. S. 1889, sec. 4329; *State v. Shaw*, 26 Mo. App. 385; *State v. Harris*, 30 Mo. App. 85. (2) As the information was not sufficiently verified, the justice had no jurisdiction. *State v. Ristig*, 30 Mo. App. 361. And the circuit court would have none on appeal. All it could do would be to dismiss the case.

GILL, J.—Defendants were charged before a justice of the peace for unlawfully disturbing the peace of the prosecuting witness and others. The information of the prosecuting attorney was based on the affidavit of R. F. Moore, filed with the justice, wherein the offense is charged "to the best knowledge, belief and information" of the affiant. The defendants were convicted in a trial in the justice's court. Defendants thereupon appealed to the circuit court, where, on a motion filed by said defendants, the information was quashed, and the state appealed.

Whatever may be said as to the legality of the information proper (as filed by the prosecuting attorney), it is clear that the affidavit, on which the same

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was based, did not comply with the law. The statute as now amended, section 4329, Revised Statutes, 1889, expressly provides that such affidavit—furnishing the basis for the information by the state's attorney—must be on the *actual* knowledge of the affiant. Here the affidavit was "to the best knowledge, belief and information" of the affiant, and, therefore, insufficient. *State v. Shaw*, 26 Mo. App. 383. And, as held by us in *State v. Cornell* (decided at this term), the vice in the affidavit will not be cured by the perfect allegations of the information based on such affidavit.

We are of the opinion, then, that the motion to quash the information was properly sustained, and affirm the judgment.

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JOHN C. OAKES, Respondent, v. IREDELL ALDRIDGE, Appellant.

Kansas City Court of Appeals, May 25, 1891.

1. **Ejectment:** WRIT AGAINST THIRD PARTIES. Where a tenant in possession is not made a party to an ejectment proceeding his dispossession by force of the writ of restitution in such proceeding is unlawful.

2. **Forcible Entry and Detainer:** ACTUAL FORCE. It is sufficient upon which to base an action of forcible entry, that the entry be made against the will of him who is in peaceable possession; there need be no actual force.

3. ——— : DAMAGES : END OF TERM. The foreclosure of a mortgage on the leased premises has the effect of ending a tenant's term; and in an action of forcible entry and detainer, in estimating the rents and profits of the tenant, the time calculated should not exceed the tenant's term; and though his term under his lease extends to March, yet, if the foreclosure takes place in the preceding August, his damages should not be calculated beyond that time.

Appeal from the DeKalb Circuit Court.—HON. C. H. S. GOODMAN, Judge.

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REVERSED AND REMANDED (*with directions*).

Lester M. Hall, Robt. A. Hewitt, Jr., and *Randolph & Woodson*, for appellant.

(1) "Forcible entry and detainer is not applicable in a case of a peaceful entry by one under color of title in himself, or as tenant of some person other than plaintiff." *Ferrell v. Lamar*, 1 Wis. 8; *Winterfield v. Strauss*, 24 Wis. 394. This was also the English rule and is followed in New York *The People v. Fields*, 1 Lans. (N. Y.) 222, 224. As the plaintiff's evidence tends to show that another than defendant ousted him, and that before defendant entered plaintiff's possession had been terminated, the case cannot be maintained under section 5088. *McCartney's Adm'r v. Alderson*, 45 Mo. 35; *Armstrong v. Hendrick*, 67 Mo. 542; *Greenleaf v. Weakley*, 39 Mo. App. 191; *Blount & Baker v. Winright*, 7 Mo. 50; *Hatfield v. Wallace*, 7 Mo. 112; *Warren v. Ritter*, 11 Mo. 354; *Spalding v. Mayhall*, 27 Mo. 377; *Drehman v. Stifel*, 41 Mo. 184. (2) The possession of the members of the family, or the servants, was the possession of John R. Oakes, and, under the writ of restitution against said Oakes and his wife, they could lawfully be removed from the premises. *Higginbotham v. Higginbotham & Clark*, 10 B. Mon. (Ky.) 369; *Mattox v. Helm*, 5 Littell (Ky.) 185; *Degraw v. Prior*, 68 Mo. 158; Freeman on Executions, sec. 475, p. 1483. Our statute concerning forcible entry and detainer is taken from the statutes of Kentucky. *Warren v. Ritter*, 11 Mo. 354. We do not think the doctrine laid down in the following cases can, in any sense, be made to apply to the case at bar, as authority on which the plaintiff may maintain this suit. *Garrison v. Savignac*, 25 Mo. 47; *Bernecker v. Miller*, 40 Mo. 473; *George v. Hufschmidt*, 44 Mo. 179. A beneficiary in a deed of trust is not entitled to possession of the mortgaged premises after condition broken, before

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foreclosure, and if, on invitation of the mortgagor, he assumes possession, he is but the tenant at will or sufferance of the mortgagor, and his tenant can occupy no better position than his landlord, the *cestui que trust*. *Siemers v. Schrader*, 88 Mo. 20. (3) The finding of the court is excessive, nor was the court justified in awarding restitution after the expiration or termination of the alleged tenancy. *Cathcart v. Walter*, 14 Mo. 17, 19; *Kelly v. Clancy*, 15 Mo. App. 519; *Salmon v. Fewell*, 17 Mo. App. 118.

S. S. Brown, *J. F. Harwood* and *Casteel & Haynes*, for respondent.

(1) The plaintiff could not be lawfully turned out of possession under a writ in an ejectment suit to which he was not a party, plaintiff being in possession at the time the ejectment suit was commenced. *Garrison v. Savignac*, 25 Mo. 47; *George v. Hufschmidt*, 44 Mo. 179. (2) There is nothing in the point made by appellant, viz.: That plaintiff can recover for only sixteen days' rent from February 12 to March 1, 1889. The plaintiff must be put back in possession, no matter if his lease has expired, and he can settle the question of rents with his landlords. That question does not concern the defendant. *Hyde v. Fraher*, 25 Mo. App 414.

ELLISON, J.—This is an action for the forcible entry and detainer of a farm in DeKalb county, in which plaintiff obtained judgment in the trial court for possession and for $560 damages and for $40 as monthly rents and profits, until restitution.

It appears that plaintiff's father, with whom plaintiff resided, had possession and either owned or had owned the premises; that while owner he gave a mortgage on the premises to Messrs. Harwood and Frederick to secure the payment of $2,500; that afterwards, on failing to pay interest, he gave up the farm, or the possession thereof, to Harwood and Frederick who,

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in the first part of the winter of 1887, rented it to his son, the plaintiff in this case; that the plaintiff occupied the farm as tenant up to February 12, 1889, when he was ousted by this defendant as set out below; that at the time of his being turned out he had rented the property for another year, that is, up to March, 1890. But in August, 1889 (the day is not shown), Harwood and Frederick sold the premises under their mortgage, and that one Orr became the purchaser at such sale.

The ousting of this plaintiff by defendant above referred to was in the following way: One Toms, whose title does not appear, began an ejectment suit against this plaintiff's father, October 31, 1887, which he prosecuted to judgment, upon which he took out a writ of restitution; that the sheriff executed the writ by removing plaintiff's father and family off of the property and turning it over to Toms' agent, who thereupon immediately leased it to defendant and immediately placed him in possession; that, upon the arrival of the sheriff and Toms' agent at the premises, the plaintiff claimed that he was in possession, but, upon being informed that the writ would, nevertheless, be executed, he immediately set out for the town of Cameron, as he says, obeying the orders of his landlords, and presumably to give them information, or obtain counsel from them. While thus absent defendant, who, it appears, was in readines, went into possession as tenant of Toms.

It will be gathered from the foregoing that plaintiff's theory is, that since he rented the premises before March, 1887, and went into possession as tenant of Harwood and Frederick, and that Toms' ejectment suit was not begun against his father till October following, he, not being a party, is not bound by such judgment, and that he has been ousted of his possession by force of a writ against other parties. If this was satisfactorily shown—and we must conclude that it was, as the court found for plaintiff—the law is with the plaintiff; for in such case the judgment and writ ought not to affect

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him. *Garrison v. Savignac*, 25 Mo. 47; *George v. Hufschmidt*, 44 Mo. 179.

But defendant insists that the action should have been unlawful detainer, instead of forcible entry and detainer. To this, we do not agree. It is sufficient upon which to base an action of forcible entry that the entry be made against the will of him who is in the peaceable possession. There need not be actual force. The authorities cited by defendant do not apply to the case plaintiff makes.

We do not care to notice in detail but one other objection to the trial below, believing that no error harmful to defendant has been made to appear. The objection referred to goes to the damages and rents and profits allowed plaintiff. The court has evidently allowed him damages without reference to the term by which he held. In estimating the rents and profits due the tenant, the time calculated should not exceed the tenant's term. A tenant's term may have only two weeks to run, when he is dispossessed, and the trial of his action may not take place for two years thereafter. In such case it would be quite out of the question to allow him rents and profits for a period in which his right did not exist. In this case plaintiff's testimony showed that he was turned out February 12, 1889, that his term would have continued up to March, 1890. But it further appears that the mortgage held by his landlord was closed out in August, in 1889, one Orr becoming the purchaser. This had the effect of ending plaintiff's term. *Culverhouse v. Worts*, 32 Mo. App. 419. The estimate of rents and profits should not include a longer period than from February 12 to August 1, which at $40 per month, the monthly value as found by the court, would amount to $224.

We will, therefore, reverse the judgment, and remand the cause with directions to the trial court to enter judgment for plaintiff for said sum of $224. The costs of this appeal will be taxed against plaintiff. All concur.

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CORNING & CO., Respondent, v. THE RINEHART MEDICINE CO., Defendant; THE GERMAN-AMERICAN BANK, Interpleader, Appellant.

Kansas City Court of Appeals, May 25, 1891.

1. **Fraudulent Conveyances:** SELLER'S LIEN: MORTGAGE: ATTACHMENT: STATUTE OF EXEMPTIONS. The statute making personal property subject to exemption for the purchase price is one of exemption only, and is not a statute conferring a lien, or establishing priority among creditors; and creditors for the purchase price of personal property stand on terms of exact equality with general creditors, between whom the prior lien holds as it would were the statute not in existence, and the vendor cannot follow the property beyond his vendee as against the claim of anyone save a purchaser with notice. If a creditor in good faith takes a mortgage without notice of the unpaid purchase price of the mortgaged goods, he has a superior lien to the subsequent attachment for the purchase price. (*Following Straus v. Sole Leather Co.*, 14 S. W. Rep. 940.)
2. **Possession:** RECORD OF ATTACHMEMT. Though the mortgagee of chattels may not take possession, yet, if before the levy of an attachment, the mortgage is fied for record, the lien thereof attaches in preference to the attachment.
3. ——: SELLER'S LIEN: MORTGAGE: ATTACHMENT. In case the mortgagee had knowledge of the purchase price being unpaid at the time of the creation of his debt, whether he should still be regarded as a purchaser with notice within the purview of the statute, or rather as a lienor taking precedence according to the time of lien, *quœre.*

Appeal from the Buchanan Circuit Court.—HON. HENRY M. RAMEY, Judge.

REVERSED AND REMANDED.

H. S. Kelley, for appellant.

(1) The court erred in refusing instruction, numbered 1, asked by the interpleader. The plaintiff had no lien on the goods for the purchase price. *Straus v.*

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Leather-Pad Co., 14 S. W. Rep. (Mo.) 940; *Parker v. Rhodes*, 79 Mo. 88; *Norris v. Brunswick*, 73 Mo. 256; *Haworth v. Franklin*, 74 Mo. 106; *Range Co. v. Alexe*, 28 Mo. App. 184; *Woolfolk v. Kemper*, 31 Mo. App. 421. (2) The court should have given instruction, numbered 2, asked by interpleader. A mortgagee in a mortgage to secure an antecedent debt is a purchaser for value. *Wine Co. case*, decided at last term, should be overruled. (1) The court erred in refusing instruction, numbered 3, asked by interpleader. If the mortgage be recorded, or if the goods be delivered, the mortgage is not fraudulent in law. R. S. 1889, sec. 5176. Recording alone is sufficient. *State ex rel. v. Cooper*, 79 Mo. 464. Or, if the goods be delivered before the attachment is levied. *Petring v. Dry-Goods Co.*, 90 Mo. 649; *Greeley v. Reading*, 74 Mo. 309; Jones, Chat. Mort., sec. 178.

James Limbird, for respondent.

(1) The court committed no error in refusing instructions asked by interpleader. The allegation of fraud in plaintiff's answer to interplea was clearly proven. The court was bound to find against the interplea and for plaintiff. *Shaw v. Tracy*, 83 Mo. 224; *Crane v. Timberlake*, 81 Mo. 432; *Stewart v. Nelson*, 79 Mo. 522; *Bohanan v. Combs*, 79 Mo. 305; *Stone v. Spencer*, 77 Mo. 356; *Shelley v. Boothe*, 73 Mo. 74. (2) There was no such change of possession as is required by law. *Claflin v. Rosenberg*, 42 Mo. 439; *Lessen v. Herriford*, 44 Mo. 323; *Howe v. Taylor*, 52 Mo. 597; *Bishop v. O'Connell*, 56 Mo. 158; *Wright v. McCormick*, 67 Mo. 426. (3) The sale of the property, goods and accounts by the German-American Bank, mortgagee, to J. R. Fitzsimmons, its agent and trustee, was evidence of fraud and a violation of the express terms of the mortgage. (4) Personal property unpaid for can be recovered under attachment. 96 Mo. 127.

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Ellison, J.—This action is based on an account for the purchase price of the property in dispute herein, and was begun by attachment. Defendants were merchants in the city of St. Joseph. Plaintiffs sold and shipped to them from Cincinnati a lot of merchandise. Before the arrival of the goods at St. Joseph, defendants mortgaged them, with others in stock, to the German-American Bank who is interpleader herein to secure a pre-existing debt. The result below was for plaintiff, and was based on the following finding of facts by the trial judge: "The court in this case finds the facts to be that the consideration for the mortgage to the interpleader mentioned in evidence herein was an antecedent debt, due to said bank by Rosegrant and Rinehart; that the goods and personal property mentioned in evidence in controversy here were not in the possession of the mortgagor at the time said mortgage was given; that one Fitzsimmons, who had previously been engaged in said store in the employ of said Rinehart Medicine Company, was left in charge of said store by said mortgagee, and that no sign was put up or other act done by either the mortgagee or mortgagor indicating any change of the possession of said store or goods, from the date of said mortgage, to-wit, the tenth day of December, until the eighteenth day of said month when said mortgage was filed for record; that afterwards the goods and merchandise attached in this case came into the said store so formerly occupied by said Rinehart Medicine Company, and into the possession of said Fitzsimmons, who claimed to hold them as agent of the interpleader; that this suit is brought to subject said property to the payment of the purchase price; that the mortgage under which interpleader claims the goods recited that the goods were not then (at the time of the execution of the mortgage) in the possession of the said mortgagor, but had before that time been ordered from said Corning & Co.; that after the commencement

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of this suit the said mortgagee sold all of said goods, except such as were attached in this case, to said Fitzsimmons, for $2,000; that no credits were placed on said note secured by said mortgage to interpleader, for any goods or merchandise sold by him, the said trustee, during the time he was in said store as trustee for interpleader, and prior to time of said sale by interpleader to him; that when said stock was sold by interpleader to said Fitzsimmons, there was a memorandum made on said note reciting the receipt of $2,000, and which was, if anything, a credit of $2,000 on said note."

The court refused a declaration of law, that if "the interpleader took possession of said property under said mortgage, and held possession of the same at the time of the taking of the same under the attachment process read in evidence, and that said mortgagee took and received said mortgage in good faith, without notice of the indebtedness of the Rinehart Medical Company, to plaintiff in the attachment, and that said mortgage was given to secure an antecedent debt owing to the mortgagee, interpleader, from James H. Rinehart and one Wm. Rosegrant, for $4,000, evidenced by the promissory note read in evidence, the finding must be for the interpleader."

"2. The court declares the law to be that a chattel mortgage given for an antecedent debt is founded upon a valuable consideration, and the mortgagee is a purchaser for value, and stands upon the same footing as if the mortgage had been given to secure a debt created at the time of the execution of the mortgage."

I. The court in all probability based its judgment on section 2353, Revised Statutes, 1879, now section 4914, Revised Statutes, 1889, as construed in the cases of *Norris v. Brunswick*, 73 Mo. 258; *Parker v. Rhodes*, 79 Mo. 88; *State v. Mason*, 96 Mo. 127; *Bolckow Milling Co. v. Turner*, 23 Mo. App. 103; *Boyd v. Furniture Co.*, 38 Mo. App. 210. These cases have been considered as having established a construction of that

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section which carried it further than a mere statute of exemptions. The statute reads: "Personal property shall in all cases be subject to execution on a judgment against the purchaser for the purchase price thereof, and shall in no case be exempt from such judgment and execution, except in the hands of an innocent purchaser, for value, without notice of the existence of such prior claim for the purchase money." In *State v. Mason*, an attachment for the purchase money by the vendor was sustained against the surviving partner of a firm who as administrator of the partnership effects had taken possession of and inventoried them, before the levy of the attachment. In *Bolckow Milling Co. v. Turner*, and in *Boyd v. Furniture Co.*, a vendor's execution for the purchase price was held superior to the prior attachment of general creditors. All these cases, in so far as they may establish priority among creditors and priority of liens, are overthrown by the recent decisions of the supreme court in *Straus v. Sole Leather Co.* (not yet reported). That case declares the statute to be one of exemptions only, and not a statute conferring a lien or establishing priority among creditors.

This court pursuing the same line of construction established as above shown, held in the recent case of the Napa Valley Wine Co. *v.* these defendants and this interpleader, that, as the interpleader's mortgage was to secure an antecedent debt, it was not a purchaser for value, and therefore fell within the terms of the statute permitting the vendor to seize property for the unpaid purchase price in the hands of all those save innocent purchasers for value. In other words, an attachment for the purchase price was permitted to take precedence of the lien of a prior chattel mortgage, securing an antecedent debt. This cannot now, under the case of *Straus v. Sole Leather Co.*, *supra*, be considered as the law in this state. I understand that, so far as liens or priorities are concerned, creditors for the purchase price of personal property stand on terms of exact equality

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with general creditors. Between them the prior lien holds as it would were the statute not in existence. So that now, instead of the law being that the vendor could follow the property for the purchase price into the hands of every one save an innocent purchaser for value, it is more properly stated that the vendor cannot follow property beyond his vendee, as against the claim of anyone save a purchaser with notice.

Our conclusion, therefore, is in this case that if interpleader in good faith took its mortgage without notice of the unpaid purchase money, as hypothetically stated in the foregoing instruction, it was a superior lien to the subsequent attachment for the purchase price, and that the instruction should have been given.

II. If on retrial the court should find that interpleader did not take possession of the mortgaged property on their arrival at St. Joseph, or that it did not afterwards take such possession, yet, if before the levy of plaintiff's attachment the mortgage was filed for record, the lien thereof attached in preference to the attachment.

III. Since a general creditor may attach (if he has cause), and his attachment lien will hold against the vendor's subsequent execution for the purchase price, or as he may bring suit, obtain judgment and execution, and this execution will take precedence over the vendor's subsequent execution, and as the effect of the decision in *Straus v. Sole Leather Co.*, especially when considered in connection with the cases it overrules, is that this may be done notwithstanding the creditor knew the purchase price was not paid, it may be suggested that, in case a mortgagee had such knowledge at the time his debt was created, he still would not be regarded as a purchaser with notice within the purview of this statute, but rather as a lienor taking precedence in accordance with the time of his lien. This suggestion is not a necessary question in this case, and we reserve any opinion thereon.

The judgment is reversed and the cause remanded.

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J. D. Thomas, Appellant, v. C. H. Moore, Respondent.

Kansas City Court of Appeals, May 25, 1891.

1. **Justices' Courts: SERVICE OF NOTICE OF APPEAL: OFFICER'S RETURN.** The statute makes it the duty of sheriffs, marshals and constables to serve judicial notices, and it is made specially the duty of the constable to serve notice of appeal from a justice, and, in doing so, he acts in his official capacity under the sanction of his official oath and the responsibility of his bond, and his return is *prima facie* evidence of the service in the manner stated therein.

2. **——— : NOTICE OF APPEAL: AMENDED TRANSCRIPT: POWER OF JUSTICE.** Though, after service of notice of appeal, the justice without rule of court filed an amended transcript of the judgment which varies the amount of the judgment from that given in the original transcript, which the notice described with sufficient accuracy, yet in passing upon the sufficiency of the notice the court cannot consider the amended transcript, as the justice has no power to file such transcript for an appeal without an order of court.

Appeal from the Cass Circuit Court.—Hon. Chas. W. Sloan, Judge.

Affirmed.

D. C. Barnett and *J. T. Burney*, for appellant.

(1) The paper purporting to be a notice of appeal does not describe the judgment of the justice. It describes a judgment for $15 and costs; and not the judgment for the recovery of the horse sued for and damages for the detention. The statute requires the notice to be in writing, stating the fact that an appeal has been taken from the judgment therein specified. R. S. 1879, sec. 3055. "It is necessary that the notice shall identify the case with reasonable certainty." In *Chadman v. Bronson*, 3 Or. 320, the court says: "If a judgment is misdescribed in the notice as for $57.75 instead of $52.50, the appellate court acquires no jurisdiction."

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Murfree's Justice Practice, sec. 764; *Hammond v. Kroff*, 36 Mo. App. 118; *McGinnis v. Taylor*, 22 Mo. App. 573. (2) The appellant shall give the appellee notice. R. S. 1879, sec. 3055. The paper purporting to be a notice of appeal in this case was not signed by defendant (appellant in the court below), but by one J. W. Graham, nor does it appear from said paper or the transcript of the justice that said Graham was defendant's agent or attorney or had any authority to represent him. Murfree's Justice's Practice, secs. 746, 750, 768; *Inhabitants, etc., Lerden v. Sweeney*, 118 Mass. 418; *Noyes v. Sherburne*, 117 Mass. 279; *Palmer v. Peterson*, 46 Wis. 401; *Laribee v. Morrison*, 15 Minn. 196; *Wolf v. Light Co.*, 70 Mo. 182; *Towner v. Remick*, 19 Mo. App. 210. (3) Notice of appeal from justices' courts must be served upon the appellee. R. S. 1879, sec. 3055. In this case the constable's return shows that the paper, purporting to be a notice of appeal, was not served upon the plaintiff (appellee below); but that it was served "by delivering to a member of defendant's family over the age of fifteen years at defendant's usual place of abode a copy," etc. Defendant was the appellant in the lower court. (4) The notice of appeal required to be given on appeal from the justice to the circuit court is not a writ or process, which the officer is bound to serve, but a paper the appellant must serve the appellee with. Even though said return should recite that it had been served on the plaintiff (appellee below), it would then not be *prima facie* evidence of such fact, as it was not sworn to. Const. Mo., sec. 38, art. 6; R. S. 1879, secs. 4037, 4038; *Fowler v. Watson*, 4 Mo. 27; R. S. 1879, sec. 3055; *Horton v. Railroad*, 26 Mo. App. 349, and cases cited; *Tiffin v. Millington*, 3 Mo. 418; Wade on Notice, sec. 1211.

Whitsitt & Jarrott and *F. C. Farr*, for respondent.

(1) It was necessary for the appellant to introduce evidence, by affidavit or otherwise, that he had

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not been served with notice of appeal. This he failed to do. He seems to rely solely upon the return of the constable, which gives plaintiff's correct name and makes a correct return in every respect, except that it inserts the word "def't," after plaintiff's name. (2) "It is a constable's duty to serve notices of appeal from a justice, and his return, being made under sanction of his official oath, need not be sworn to." *Boyle v. Tolen*, 8 Mo. App. 93. (3) The service was upon the right party, and, therefore, good. The use of the word "defendant" by the constable in his return could not operate to vitiate the service. (4) The notice may be served in like manner as an original writ of summons. R. S. 1879, sec. 3055. (5) The notice is in proper form, and is a literal compliance with section 3055. R. S. 1889, p. 2268, form No. 179, "notice of appeal." (6) The justice had no authority to file the amended transcript. *Smith v. Chapman*, 71 Mo. 217; *Norton v. Porter*, 63 Mo. 345. The notice of appeal contained a specific description of the judgment as shown by the original transcript of the justice. The statute has been amended since the decision of the court in *Tiffin v. Millington*, 3 Mo. 418. The other authorities cited by appellant have no application to the case at bar. R. S. 1889, sec. 6342; Kelley's New Treatise, Justice Practice, sec. 147, p. 148; *Horton v. Railroad*, 26 Mo. App. 357; R. S. 1889, secs. 3508, 2036.

SMITH, P. J.—This action arose in a justice's court. The plaintiff had judgment from which defendant took an appeal in vacation within ten days after the rendition of the judgment. In such case, it is by the statute made the duty of the appealing defendant, to serve notice on the plaintiff of the taking of the appeal. If such notice is not given within ten days next before the commencement of the second term of the appellate court, the judgment of the justice shall be affirmed on

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the motion of the plaintiff, the appellant. In opposition to a motion thereto the defendant offered and read in evidence a notice of appeal on which was this indorsement:

"I hereby certify that I served the within notice by delivering to J. D. Thomas, defendant, herein a full, true and perfect copy of the within notice of appeal on the twentieth day of August, 1889, in West Dolan Township, Cass county, Missouri.

"J. E. Berry,
"Constable, Township."

These words appear above the return, "wife, who is a member of the family and over fifteen years of age." Attached to the foregoing return on a separate piece of paper is another return of the constable, which is without date. It does not purport to be an amended return. How or when it was attached to the return indorsed on the back of the notice is not made to anywhere appear. If it was intended as an amended return there is nothing in the records showing at what time, or by what authority, it was made. It is true that the bill of exceptions shows that the defendant offered in evidence on the hearing of the motion to affirm, "the notice of appeal and the amended return." Which is the amended return, that indorsed on the notice with the words already stated written above it, or the one on the separate piece of paper attached to the notice of the appeal? The abstract of the appellant sets forth this latter return as the one which was offered in evidence on the motion to affirm, but the appellee disputes the correctness of the appellant's abstract in this particular and sets forth as the return the one which we have set forth *in extenso*. In order to satisfy our mind in this regard we have caused to be submitted to us for inspection the original notice with the returns thereon and thereto attached, from which we conclude that the return which is indorsed on the notice of the appeal is that which was offered in evidence on the motion to

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affirm. The words written above the return already referred to were probably intended as an amendment to the return, but as there is no *caret* or other mark indicating that these words were wanting, or to be inserted at any particular place in the return, to complete it, we cannot regard them as a part of the return, whatever function they may have been intended to perform. The return which we have set forth must be regarded as that which was introduced in evidence on the motion to affirm. This motion being overruled, the plaintiff refused to further appear in the case, and the court dismissed the cause for want of prosecution. The plaintiff filed a motion to set aside the judgment, which being overruled he thereupon prosecuted his appeal here.

The single question thus presented is, whether the return of service made by the constable on the notice was sufficient to invest the circuit court with jurisdiction. The statute provides that the notice of appeal may be served in like manner as an original summons, or by delivering a copy of the same to the appellee by any person competent to be sworn as a witness. R. S. 1879, sec. 3055. An original writ of summons from a justice must be served by a constable. Sec. 2858; *Horton v. Railroad*, 26 Mo. App. 357. By section 3508, Revised Statutes, 1879, chapter 59, relating to practice in civil cases, it is provided that the service of any notice required by this chapter may be made by any sheriff, marshal or constable or by any person who would be a competent witness, who shall make affidavit to such service; and any such officer shall be bound to serve notices equally *with summons* or other writs, and shall be in like manner liable for neglect. In *Boyle v. Tolen*, 8 Mo. App. 93, the St. Louis Court of Appeals say, "the last paragraph of this section, 3508, seems to be sufficiently general in its terms to cover all notices in judicial proceedings; and, under this provision, we think it is made especially the duty of a constable to serve notice of appeal from a justice, and that in doing

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so he acts, therefore, in his official capacity. But the return of an officer to process, which it is made his duty to serve, is at least *prima facie* evidence in all cases of the facts therein contained. The return of an officer to a notice in a judicial proceeding which it is made his duty by law to serve need not be sworn to any more than his return to process. In either case the duty is to perform under the sanction of his official oath and under the responsibility of his bond." We think the return of the constable was *prima facie* evidence in this case, of the service of notice in the manner stated in his return. The return, therefore, of the constable was amply sufficient to invest the circuit court with jurisdiction of the appeal.

Some point is made as to the sufficiency of the notice of the appeal, but we think it is not subject to the objection lodged against it. While it seems that great particularity must be observed in giving notice of appeal, we think that given in this case, sufficiently specific. It is true that after the notice of the appeal had been served on the appellee, that the justice filed an amended transcript of the judgment, which varies the amount of the judgment from that given in the original transcript which was filed by the justice, and which the notice describes with sufficient accuracy. A justice of the peace has no power to file an amended transcript for an appeal without an order of the circuit court. In this case there was no such order, and, hence, the amendment was void and without effect. *Smith v. Chapman*, 71 Mo. 217; *Norton v. Porter*, 63 Mo. 345. The judgment contained in the amended transcript must be disregarded by us in the consideration of the question of the sufficiency of the notice of the appeal.

It results that the judgment of the circuit must be affirmed. All concur.

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46 28 D. M. OSBORNE & Co., Appellants, v. C. L. GRAHAM
93 [1]653 *et ux.*, Respondents.

Kansas City Court of Appeals, May 25, 1891.

1. **Married Women:** PLEADING: LIEN ON PRODUCTS OF SEPARATE ESTATE. The separate property of a married woman, when it is sought to charge it with a lien under the statute, must be described in the petition, and, the separate estate being an indispensable element of the proceedings, must exist when the contract is made out of which the liability arises, and its existence must continue to the institution of the suit, and a petition failing to show these essential facts is fatally defective.

2. ——: LIEN ON PRODUCTS OF SEPARATE REALTY: PRACTICE: RECEIVER OR INJUNCTION. In order to continue the *res* so that the same may be subject to a lien, the creditor may invoke the appointment of a receiver or the aid of an injunction.

3. ——: SALE: DEBT OF HUSBAND: LIEN ON PRODUCTS OF WIFE'S REALTY: MATERIALS FOR ITS CULTIVATION. A review of the evidence in this case shows the debt sought to be charged as a lien on the products of the realty to be the sole debt of the husband, and that the materials—a reaper, a binder and a mower—were not principally purchased for the cultivation of the wife's real estate, though incidentally used thereon, and such secondary use is not sufficient to charge the products of her real estate.

4. ——: LIEN ON PRODUCTS OF WIFE'S REALTY: NECESSARY MATERIALS: EXPENSE. Materials furnished for the cultivation of the wife's real estate, to bind her separate estate in the annual products thereof, should be for necessary materials and of a kind and quality not necessarily expensive.

Appeal from the Audrain Circuit Court.—HON. E. M. HUGHES, Judge.

AFFIRMED.

Geo. Robertson, for appellant.

(1) The products of the wife's lands may be levied upon for a debt made by the husband for the

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cultivation of such lands. R. S. 1889, sec. 6868; R. S. 1879, sec. 3295. (2) Cultivation includes reaping and sowing crops. See the terms agriculture and cultivation, Anderson's Dictionary of Law. (3) The proper proceeding was a suit against the wife to subject the products of her lands to payment of this debt. *State to use v. Armstrong*, 25 Mo. App. 532; *Gabriel v. Mullin*, 30 Mo. App. 464; *Bedsworth v. Bowman*, 31 Mo. App. 116.

No brief for respondent.

Smith, P. J.—This suit was brought in the circuit court of Audrain county by the plaintiff to have the amount of two judgments declared a lien and charge upon "the crop of oats, hay, corn and other crops upon the lands" of the defendant, M. J. Graham, a married woman, and the wife of the other defendant. The petition alleged that on the ninth of July, 1884, plaintiff was a corporation, and that the defendants, husband and wife, were residing and engaged in farming on one hundred and sixty acres of land in Audrain county belonging to the wife; and that on the said date defendant, C. L. Graham, bought of plaintiff one Osborne reaper and binder and one mower for $250, and executed his two promissory notes therefor, each for $125, one of which was made payable on September 1, 1884, and the other on January 1, 1886; that neither of said notes being paid at maturity the same were put in judgment; that one of said judgments was entitled to a credit of $70; that said machinery was bought for the use, cultivation and improvement of the said farm and was so used by defendants thereon; that "defendants have now upon said land crops consisting of oats, hay, corn and other crops," of the value of $500; that defendant, C. L. Graham, is, and has been, insolvent at all times since the rendition of said judgment. Judgment was prayed that a lien on said crops be declared

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for the amount of said judgment debt. The answer admitted the defendants were husband and wife; the purchase of the machinery and execution of the notes by defendant, C. L. Graham, and put in issue the truth of the other allegations of the petition.

The bill of exceptions shows that the evidence adduced at the trial was in substance, "that Margaret J. Graham is now, and at all dates, as in the petition set forth, was the owner of a farm of one hundred and eighty acres of land in Audrain county, Missouri and that said husband and wife lived thereon, and that it was inherited from her father." C. M. Dyson, being called upon the part of the plaintiff, testified as follows: "I knew defendants in the year 1884, and when defendant, C. L. Graham, bought the binder and mower, I was living at their house at the time. Graham had in that year on his wife's farm thirty-five or forty acres in oats and fifteen acres in meadow. He used this Osborne binder to cut and bind those oats and the mower to cut the grass with. He tended and cultivated the farm that year and did before and has since, except parts that have been rented out to farmers of the neighborhood. Before he cut the oats on his wife's farm he had used the binder in cutting some wheat for Gideon Mallory, some oats for Mrs. Duly and some wheat for John Meyers. He cut about eight acres of wheat for Mallory, ten or fifteen acres for Mrs. Duly and a like amount for Meyers. When Mr. Graham bought the machine he brought it and set it up at Mallory's. He used the mower only on his wife's place." Jefferson D. Sims testified that he did defendant Graham's threshing the year of 1884 and that the oats had been bound by a binding machine with twine. G. L. Ferris testified on the part of plaintiff that he was the agent of D. M. Osborne & Co., the year 1884, for the sale of binders, reapers and mowers, and that in the year 1884 he sold and delivered to defendant, C. L. Graham, a binding machine which both reaps and binds the grain, and also

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a mower for the sum of $250; that the price of the binder was $210, and the mower was $40; that Graham gave him two promissory notes for the machinery payable to plaintiff: One for $125, due September 1, 1884, the other one for $125, due January 1, 1886; that he supposed when he sold said machinery to Graham that he was solvent and that he was the owner of the farm he lived on, and Graham told him he wanted to use it on that farm and may have told him he wanted to cut for his neighbors, too; that at that time and now all farmers in Audrain county use machinery of that character to harvest their grain with; that sometimes two or three farmers will club together and buy such machinery, and sometimes one man will buy it and cut for his neighbors; but that such machinery is common and in general use by all the farmers of the county. "Farmers raising a small quantity of grain could not afford to buy such machinery, but could better afford to hire it cut. It depends upon what quantity of grain a man raises and his circumstances, whether he can afford to own such machinery. When I sold Mr. Graham the machinery I took his individual notes without any security and looked to him for the payment; I then thought he was solvent. As these two notes became due plaintiff brought suit against C. L. Graham and obtained judgment against him on both notes. Under that judgment execution was issued and was levied on the machinery, which was sold under it, and since that time this suit was brought against Mrs. Graham." It was shown by plaintiff that said debt was entitled to a credit of $70 paid by said husband, C. L. Graham, and that he was insolvent in 1884, and now that both notes have been put into judgment against the husband, C. L. Graham, before the commencement of this suit; that the said machinery was sold under a judgment and execution of plaintiff against C. L. Graham after it had been used by him only one year, and that sale is what produced the above credit leaving the balance of the judgment unpaid.

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The defendants, to sustain the issues upon their part, called Jefferson Powell who testified, that at the time Graham bought said binder and mower of plaintiff's agent he was present and heard Graham, the husband, say to the agent Ferris, "I want the payments so arranged that I can collect up the money I make in cutting out with this machinery to pay these notes, as that is the way I expect to make the money to pay for the machinery." And further, on cross-examination, he testified, that he also bought a binder from the same agent the same year that Graham did, and that he afterwards exchanged it, the same year, for a combined reaper and mower, and that he owned and cultivated a farm of one hundred and twenty acres in Audrain county. On redirect examination he further testified that he owned other lands and property in said county, he cultivated all of his farm and raised a large quantity of hay and oats; as a rule, farmers do not own a combined reaper and mower. This is a stock country and a great deal of grass, and corn is raised. Farmers raising only thirty or forty acres of oats, and fifteen to twenty acres of grass, cannot afford to own such expensive machinery, and it is cheaper for farmers to hire oats and grain of that quantity cut. They can have oats cut and bound at fifty cents per acre. Margaret J. Graham, being sworn, said, she was a defendant and was the wife of C. L. Graham; that her husband tended and cultivated her farm, except such parts as she had rented out to neighboring farmers, and that she and her husband kept their business separate and kept separate accounts; that the farm consisted of one hundred and eighty acres, forty of which was in pasture at the time this machinery was bought and is now, and the balance is in cultivating lands and meadow; that he raised oats and grain every year on her farm for the use of the family; that she and her husband kept their business separate and kept separate accounts and owned separate stock and property; that in 1884, when this machinery

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was bought, she had all her farm rented out in her own name, except thirty-five or forty acres in oats and fifteen to eighteen acres in meadow and small pasture; that she rented out every year the larger part of her farm; that she never raised more than thirty or forty acres of oats and fifteen to eighteen acres of meadow in any year; that she never raised sufficient grain and meadow on her farm at any time to justify the purchase of a reaper or mower. A. C. Marshall testified on the part of the defendants, that one J. C. Huff was, in the year 1884, the partner of G. L. Ferris in the business of selling reapers and mowers, and that he heard Huff say to one Wilcox, in July, 1884, that he had just sold C. L. Graham a reaper and mower, and that "he is to give his notes for it and we are to wait until he cuts his grain with it and makes money enough to pay for it;" that Graham had bought it to cut grain for hire and expected to pay for it in that way. Here the defendants closed, and the cause being submitted to the court it found for the defendants and rendered a judgment in their favor for costs, dismissing the bill for plaintiff. Plaintiffs appeal.

I. The petition of the plaintiff is assailed on the ground that it does not state facts sufficient to entitle the plaintiff to the relief that it has in its petition demanded. This is, it is perceived, a proceeding to subject the statutory separate property of the wife to a lien of a debt contracted by the husband. The statute, Revised Statutes, section 3295, provides that, "the rents, issues and products of the real estate of a married woman * * * during coverture shall be exempt from attachment or levy of execution for the sole debts of her husband; * * * provided such annual products may be attached or levied upon for any debt or liability of her husband, created for necessaries for the wife and family, and for debts for labor or materials furnished, upon or for the cultivation or improvement of such real estate." Does the petition state the facts necessary to authorize

the court to adjudge a lien in favor of the plaintiff against the products of the wife's real estate? The petition fails to allege that the wife, at the time the debt was contracted by the husband, had or owned any crops, the product of her real estate, which were liable to be levied upon for such debt. It shows only that at the time of the rendition of the judgment on the notes of the husband, given for the debt, that the husband and wife had on her real estate crops of oats, hay, corn and other crops. There is no allegation that the wife alone at the time of the contracting of the debt or subsequently thereto had or owned any specific annual products of her real estate. There is no allegation even showing that the wife alone had any annual product of her estate at the time of the rendition of the judgment against the husband, which continued to exist until the institution of the suit. The annual crops of the wife in existence in 1884, when the debt was contracted, or in 1886 when the judgment was rendered, are not alleged to have been in existence when the suit was commenced. There is presumably nothing upon which the decree, if made, could operate. Upon what particular and specific separate property of the wife is it sought to establish a lien? Where situate and in what does it consist? The petition does not answer these questions. If the court should make the decree which plaintiff demands, and a special *fieri facias* was awarded thereon, could it be executed by the officer to whom directed? It would be so vague and uncertain as to be incapable of enforcement. The property under the description could not be identified if in existence.

Hence it is, that it has been judicially determined, that the separate property sought to be charged must be described in the petition, and the separate estate being an indispensable element of the proceeding, it must exist when the contract is made, out of which the liability arises; and its existence must continue to the institution of the suit. If, when the contract is made,

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the estate does not exist, the liability cannot arise, and if exhausted, or from any cause ceases to exist before the institution of the suit, there could be no foundation for the judgment. *Gabriel v. Miller*, 30 Mo. App. 464; *Peppir v. Jones*, 52 Ala. 161; *Reorsiers v. Stoddard*, 32 Ala. 599; *Arnold v. Brockenborough*, 29 Mo. 625.

It is suggested that the requirements of these rules frustrate and defeat the purpose of the statute; that they render it impossible for a creditor of the husband to avail himself of the benefits of the statute in securing a lien upon, and satisfying his debt out of, the product of the wife's real estate. We answer this objection by stating that, in cases of this kind when it is sought to subject the annual product of the wife's real estate to a lien for a debt of the husband under the proviso of section 3295, Revised Statutes, that it would be a proper practice for the creditor in order to continue the existence of the *res*, so that the same may be subjected to a lien for his debt, to invoke in his petition for the lien either the appointment of a receiver, or the aid of the injunctive process of the court. In this way a proceeding like the one here attempted could be made effectual. We, therefore, are of the opinion that the plaintiff's petition is subject to the objection that has been lodged against it.

II. An examination of the evidence has not convinced our mind that the plaintiff is entitled to the relief which he seeks. If the plaintiff's debt was the sole debt of the husband, then the product of the wife's real estate was, under the statute, exempt from levy of execution against the husband therefor. If however the debt was created for materials furnished upon, or for the cultivation of, the real estate of the wife, then the annual products of her real estate are liable for such debt. Was the debt in this case the sole debt of the husband? The evidence is somewhat conflicting, but we think that by a great preponderance it supports the conclusion that it was the sole debt of the husband.

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The machinery was sold to the husband on credit. The time of payment was fixed, as was admitted by plaintiff's agent who made the sale, far enough off to enable the husband to cut grain enough for others with the machinery for hire to pay for it. It further appears that at the time the plaintiff's agent sold the machinery to the husband that he told the agent that "I want the payments so arranged that I can collect up the money I make, in cutting out with this machinery, to pay these notes, as that is the way I expect to make the money to pay for the machinery." The wife only cultivated, it seems, a small portion of her real estate, renting the most of it out to others. Suit was brought and judgment obtained against the husband alone on the notes, and the machinery levied upon and sold as his individual property. These facts and circumstances all tend to show that the purchase of the machinery was a venture of the husband alone, and not as the agent in law of his wife. It looks very much like the idea was an afterthought of the plaintiff that this debt was created for materials furnished for the cultivation of the wife's real estate. If farm machinery is comprehended by the descriptive term "materials," it does not sufficiently appear by the evidence that such materials were furnished by plaintiff for the cultivation of the wife's land, the mere fact that the husband incidentally used the machinery on a small part of his wife's land does not prove that it was furnished for the cultivation of the wife's real estate, any more than if the husband had purchased an expensive steam threshing machine and used it in threshing the few acres of oats raised by the wife on her farm. The evidence, we think, shows the machinery was not primarily purchased or furnished for the cultivation of the wife's real estate. The use on the farm was a mere incident, secondary. We should suppose that a debt created for materials furnished for the cultivation of the wife's real

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estate, to bind her separate estate in the annual products thereof, should be for necessary materials. We hardly think that if the husband buy any unnecessary and expensive farm machinery that he may choose, that the statute would make the debt created therefor a lien on the annual products of the wife's land, even if such machine should be incidentally used thereon. The lines of limitation on the binding power of the husband, in creating debts chargeable against the products of the wife's land, must be drawn somewhere. In creating debts for materials furnished for the cultivation of the wife's real estate, such materials ought to be necessary and of a kind or quality not unnecessarily expensive. The evidence, like the petition, fails to show the existence, at the time of the creation of the debt or the bringing of the suit, of any annual products of the wife's real estate, which the court could lay hold of and subject to a lien. We cannot discover that the plaintiff was entitled to any relief either upon the facts alleged in his petition or the evidence preserved in the bill of exceptions, so the judgment of the circuit court dismissing the plaintiff's petition will be affirmed. All concur.

MARTIN HUGHES, Appellant, v. A. W. FAGIN, Respondent.

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St. Louis Court of Appeals, January 27, 1891.

Motion for rehearing overruled May 26, 1891.

1. **Master and Servant:** CONTRIBUTORY NEGLIGENCE. A carpenter while at work on an elevator shaft, and while the elevator was in use and above him, leaned a portion of his body inside of the shaft. The boy in charge of the elevator, though knowing that persons were at work in the shaft, lowered the elevator at full speed without giving the warning which he had been accustomed to give,

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and the carpenter, being absorbed in his work and in a poor position for observation, was struck by the elevator unawares and injured. *Held* (ROMBAUER, P. J., *not concurring*), that it was a question of fact for the jury, whether or not the carpenter was guilty of contributory negligence.

2. ——— : FELLOW-SERVANTS. At the time of such injury the building in which it occurred was in process of erection, and the carpenter was engaged at work in the course of its construction. The elevator was used at the time for the purpose of raising and lowering the workmen and their materials, and also persons desirous of inspecting rooms in the building. *Held* that the carpenter and the elevator boy were fellow-servants engaged in the same general employment.

3. ——— : INJURY OF SERVANT THROUGH INCOMPETENCY OF FELLOW-SERVANT. *Held* (ROMBAUER, P. J., *dissenting*), that, where a servant continues in the service with knowledge of the incompetency of a fellow-servant without complaint, it is ordinarily a question for the jury whether he is to be deemed to have accepted the risk of injury through such incompetency; though, where the danger is so glaring that it is rash and foolhardy for him to continue in the service, the court can so pronounce as a matter of law.

Appeal from the St. Louis City Circuit Court.—HON. JACOB KLEIN, Judge.

REVERSED AND REMANDED.

John J. O'Connor, for appellant.

(1) If the court gave the instruction for defendant on the theory that appellant was guilty of contributory negligence, it erred, because contributory negligence, unless open and avowed, or where the conduct depended on to show negligence is such as to preclude any other view, is a fact to be found by the jury. *Brown v. Railroad*, 99 Mo. 310; *Conroy v. Iron Works*, 62 Mo. 39. Appellant was not negligent, if becoming engrossed in his labor he failed to see the elevator descend. It was for the respondent to use care. *Gessler v. Railroad*, 32 Mo. App. 413; *Donovan v. Gay*, 97 Mo. 440; *Matthews v. Railroad*, 26 Mo. App. 75; *Taylor v. Railroad*, 26 Mo. App. 336. (2) If the

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instruction was given on the theory that appellant was barred by reason of his knowledge of the carelessness of the boy, previous to the injury, and, with such knowledge, remained at work, the court erred; because, admitting the boy to be the fellow-servant of appellant, still the evidence showed that he gave the boy notice about an hour before the injury to use care, and, therefore, notwithstanding the work was dangerous, thought that with care he could do the work with safety. In such case it was for the jury to say, from all the evidence, whether the danger was such as to warrant this belief, or was so great as to cause a person of ordinary prudence to refuse the work. *Thorpe v. Railroad*, 89 Mo. 551; *Huhn v. Railroad*, 92 Mo. 440; *Stevens v. Railroad*, 86 Mo. 230; *Bland v. City of Kansas*, 32 Mo. App. 8; *Barry v. Railroad*, 98 Mo. 62; *Soeder v. Railroad*, 100 Mo. 681. (3) The boy who operated the elevator was not the fellow-servant of appellant; he is part of the elevator (Wood's Master and Servant, sec. 394), and his negligence may be treated as a defect of the elevator machinery. And that appellant remained working about the elevator after becoming aware that the boy was careless does not bar a recovery in this case, unless the danger of working about said elevator while operated by said boy was so great as to cause a person of ordinary prudence to refuse to incur the danger. And whether it was so dangerous or not, is a fact for the jury to determine. *Conroy v. Iron Works*, 62 Mo. 39; *Thorpe v. Railroad*, 89 Mo. 663. The rule that all persons engaged in the prosecution of a common work, and paid by one master, are fellow-servants, has many exceptions. *Sullivan v. Railroad*, 97 Mo. 113; *Riding v. Railroad*, 33 Mo. App. 527.

Rochester Ford, for respondent.

(1) Plaintiff and elevator boy were fellow-servants, and defendant is not liable to plaintiff for the negligence of a fellow-servant. *Marshall v. Shricker*, 63

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Mo. 308; 2 Thompson on Neg., p. 1026, sec. 31; *Moore v. Railroad*, 85 Mo. 588, 594. (2) Plaintiff cannot recover for the injury occasioned by the alleged incompetency, recklessness and carelessness of the elevator boy, because plaintiff had knowledge of the same before such injury, and, notwithstanding such knowledge, remained in defendant's employ without objection. *McDermott v. Railroad*, 87 Mo. 285.

THOMPSON, J.—This was an action for damages for an injury alleged to have accrued from the negligence of the defendant in employing an unfit and incompetent fellow-servant of the plaintiff, through whose carelessness the injury was inflicted. At the close of the plaintiff's evidence the court directed the jury that the plaintiff could not recover. Thereupon the plaintiff took a nonsuit, and, having moved unsuccessfully to have the same set aside, appeals to this court.

The petition alleges, in substance, that the plaintiff was employed at work on a building in process of erection, belonging to the defendant; that in the building there was an elevator, which was operated by a boy employed by the defendant for that purpose; that this boy was careless and negligent, and was an improper and dangerous person to intrust with the operation of the elevator; that the plaintiff, while at work in the elevator shaft, was struck by the elevator and injured in consequence of the negligence and carelessness of the boy then operating it,—which negligence consisted in lowering it at full speed, instead of a reduced speed, as he should have done, knowing that the plaintiff was at work in the shaft; and, also, in not giving the plaintiff any warning that he was about to lower it. The answer was a general denial and a plea of contributory negligence.

The plaintiff's evidence tended to show that he was employed by the defendant's foreman to work as a carpenter in the defendant's building on Olive street in the

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city of St. Louis, in process of erection; that the building was eight stories high; that, for the purpose of raising and lowering the workmen, their materials, and also persons desiring to inspect the rooms, an elevator was placed in the building and was operated by a boy, who was a son of the superintendent of the work; that this boy was habitually negligent and reckless in operating the elevator; that this fact was well known to the men at work in the building including the plaintiff; that it must also have been known to the superintendent, who was the father of the boy; and, inferentially, that it was also known to the defendant, from the fact that he was frequently in the building, and frequently occupied a seat in a chair near the elevator, inspecting the work.

The plaintiff's evidence tended to show that, when he received the injury, the elevator was at the top of the shaft at the level of the eighth floor, and was standing still; that the plaintiff, in the course of his employment as a carpenter, commenced to do some work on the elevator shaft, and, in so doing, leaned a portion of his body inside of the shaft; that the boy commenced lowering the elevator at full speed without giving him the warning, which he had been accustomed to give when lowering the elevator, knowing that persons were at work in the shaft; that, being absorbed in his work and being in a position where he could not well observe, he did not see or hear that the elevator was descending until it struck him, injuring him severely.

We apprehend, from a reading of the testimony, that the ruling of the learned judge in nonsuiting the plaintiff could not have been based on the theory of contributory negligence, It seems to us that it was a fair question for the jury, under all the circumstances, whether the plaintiff was negligent in leaning any portion of his body inside the elevator shaft in doing the work, and also in failing to observe the elevator when it descended.

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We, therefore, assume that the ruling of the court was based upon the theory, that the plaintiff and the boy were fellow-servants engaged in the same general employment; that, if the boy was unfit for the service in which he had been placed, and if the defendant knew, or by exercise of reasonable care might have known, of such unfitness, it was equally known to the plaintiff; and that, by remaining in the defendant's service after the knowledge of the unfitness of the boy, without making any complaint thereof to the defendant or to his foreman, the plaintiff must be assumed, as a matter of law, to have voluntarily accepted any risks of injury which might accrue from the unfitness of the boy. There is much force in this conclusion; and if it rested upon the law, as embodied in the decisions of our supreme court as they stood twenty-five years ago, we should probably affirm it. But, beginning with the case of *Conroy v. Iron Works*, 62 Mo. 35, those decisions have undergone such modifications that a majority of the court are constrained to hold that, under the facts above stated, whether the plaintiff had accepted the risks of injury from the negligence or incompetency of the elevator boy, was a question of fact to be left to the decision of the jury.

We are of opinion that the plaintiff and the elevator boy were fellow-servants within the rule, which precludes a servant from recovering damages from his master for an injury happening through the negligence of a fellow-servant engaged in the same general employment. A well-known exception to this rule is, that the master is bound to exercise reasonable care in the selection of his servants, to the end that one servant shall not be subjected to unreasonable or unusual danger in consequence of the unfitness of a fellow-servant. Whenever a recovery of damages against the master takes place under this exception to the general rule, it is necessarily predicated upon the personal negligence of the master, or upon that of his vice-principal to whom he

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delegates the duty of employing servants, in not selecting fit and competent servants to do the work assigned to them.

The duty, which the master owes to his servant, of exercising reasonable care in selecting fit and competent fellow-servants, is a duty of the same nature as the duty which he owes to them of exercising the like care in selecting proper machinery and appliances to be used by them. On the other hand, if the servant, knowing the unfitness of a fellow-servant, elects to continue in the employment without complaint, he thereby releases any right of action for damages against the master, to the same extent and upon the same ground as where, knowing of a defect in a machine or appliance furnished him by the master to be used, he continues to use it without complaint. Under former rulings of our supreme court, and of the courts of most other jurisdictions, if the defect in the fellow-servant or in the machine was equally apparent to the servant and to the master, the servant was deemed as matter of law to accept the risks of injury from such defect, as one of the risks of his employment; and, if injured in consequence of it, he could not recover damages from the master. This rule declined to recognize any inequality in the situation of the master and the servant, but placed them on an equal footing. It was analogous to the well-known rule in respect of contributory negligence, under which *any* negligence on the part of the person injured, materially contributing to the injury, was a bar to a recovery of damages. But later decisions of our supreme court and of other courts seemingly recognizing the inequality in the situation of the master and the servant, and, proceeding upon conceptions more just and humane, are to the effect that the servant is not, as matter of law, deemed to accept the risks of injury from the unfitness of the fellow-servant, the machine, or the appliance, unless such unfitness is so glaring and palpable that a prudent man would not remain in the service; and that,

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whether the servant does accept the risks by remaining in the service is ordinarily a question to be submitted to a jury. Among the decisions of our supreme court which state and apply this doctrine are the following: *Conroy v. Iron Works*, 62 Mo. 35; *Stoddard v. Railroad*, 65 Mo. 514; *Devlin v. Railroad*, 87 Mo. 545; *Huhn v. Railroad*, 92 Mo. 440, 447; *Soeder v. Railroad*, 100 Mo. 673, 681. In the case last named, which, so far as we are aware, is the last decision of our supreme court upon the subject, the court, speaking through Mr. Justice BRACE, used this language: "Conceding, however, that the deceased was perfectly familiar with this track and remained in defendant's employment, this of itself would not have been sufficient to defeat a recovery. The deceased's knowledge of the unsafe condition of the track, if it was unsafe, would not defeat a recovery, if 'it was not so dangerous as to threaten immediate injury, or if he might have reasonably supposed that he could safely work about it by the use of care and caution.' *Huhn v. Railroad*, 92 Mo. 440, and cases cited. The court committed no error in refusing to take the case from the jury."

The constitutional amendment, adopted in 1884, relating to the appellate courts of this state, contains, in section 6, this provision: "The last previous ruling of the supreme court on any question of law or equity shall, in all cases, be controlling authority in said courts of appeals." Whatever our individual views might be as to the proper rule upon this question, we are, therefore, constrained by the constitutional mandate to follow the last rulings of the supreme court. But, as this case has invoked a difference of opinion among the members of this court, I will take occasion to say for myself that, in my opinion, the recent rulings of our supreme court upon this question are more consonant with justice and humanity than were its previous rulings. They tacitly recognize, although they may not state it in express terms, the unequal situation of the

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master and the servant. The former is generally a man of means; the latter a mere wage-worker. The former presumptively has the means of furnishing safe and suitable machinery and fellow-servants; the latter is obliged, in many cases, to accept unreasonable risks rather than throw up a job, and thereby subject his family to privation. In a moral sense the measure of their duty and obligation is, therefore, not the same, because they have not the same liberty of choice. In the present case, for instance, the plaintiff, a journeyman carpenter working by the hour, might have complained to the defendant's superintendent, who was the father of the elevator boy, of the unfitness of the boy, or he might have made such a complaint to the defendant himself, and in either case, as a consequence of his temerity, he might have lost his job, and thereby subjected his family to want. It seems to us that it is, under all the circumstances of such a case, ordinarily a fair question for a jury whether, in failing so to complain, he is to be deemed as accepting the risk of any injuries which might happen to him in consequence of the negligence or the incompetency of the fellow-servant; though, where the danger is so glaring that it would be rash and foolhardy for him to continue in the service, the court can so pronounce as matter of law.

A majority of the court have been constrained to proceed upon this view, in respect of a defective appliance furnished by the master to his servant, in the case of *Fugler v. Bothe*, 43 Mo. App. 44. The views upon which we proceeded in that case are strictly applicable in the decision of this case, the only difference being that there the negligence of the master, if any, consisted in subjecting the servant to the danger of a defective appliance, while here it consists in subjecting him to the danger of an unfit fellow-servant.

The judgment will accordingly be reversed, and the cause remanded. Judge BIGGS concurs; Judge ROMBAUER dissents.

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ROMBAUER, P. J. (*dissenting*).—Assuming as the opinion concedes that the boy running the elevator was a fellow-servant of the plaintiff, I cannot construct any theory of the evidence, which would have justified a submission of the case to the jury. The plaintiff, according to his evidence, was an expert journeyman of eight years' experience in elevator work, thoroughly familiar with the method of running elevators, and the incident dangers of such work. It is not shown that the defendant had any knowledge or experience in the matter. The carelessness of the boy was well known to the plaintiff, as he worked on this elevator shaft while the boy ran the elevator for a period of at least one week, and probably much longer. While there is some evidence that the defendant at times saw how the elevator was run, it is always coupled with the additional statement that, whenever the defendant was present, the boy was more careful. The observation made in the opinion that an employe is under no obligation to call the negligence of his fellow-servants to the attention of his employer, because he might thereby incur the danger of being discharged, strikes me as not resting on a sound moral basis. It seems to me that such an act of an employe, being the discharge of a simple duty on his part, which he owes alike to his employer, to his fellow-servants and to himself, would meet with the commendation of every humane man, and I see no reason for assuming that employers are as a class inhumane. Certainly, there is no evidence in the record that this defendant was so, because it stands conceded that he was constantly on the alert to watch over the safety of his employes.

On the question of the plaintiff's contributory negligence, as a matter of law, the case is probably not quite so strong. But even on that question the following uncontroverted facts are entitled to weight. The plaintiff was working in the sixth story, and the elevator before it began to descend was in the eighth, which

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was the topmost story of the building. The plaintiff knew that the elevator could ascend no further, and that its next movement would necessarily be downward. With full knowledge of that fact, without any warning to the elevator boy, who was less than twenty feet above him and within convenient calling distance, the plaintiff without any apparent necessity placed his arm in a position, where he knew it was bound to be hurt if the elevator descended. The cables moving the counter weights were in plaintiff's full view, and he could, by paying the slightest attention to them, at any time see that the elevator was descending, and yet failed to do it. The question of contributory negligence, as a matter of law, is one, as Judge BLACK aptly says in the recent case of *Weber v. Railroad*, 100 Mo. 194, which has to be determined not from an isolated fact, but from all facts and circumstances surrounding the case. In view of all the facts and circumstances in this case, I am not prepared to say that the court erred in nonsuiting the plaintiff even on the ground of contributory negligence. "One cannot thus voluntarily place life and limb in peril, and claim to be free from fault. But for the plaintiff's negligence he would not have been injured." These remarks made by the learned judge in the case above cited seem to me to be applicable to this.

MARTIN NEISER, Plaintiff and Appellant, v. EMILE THOMAS AND HENRY W. WILLIAMS, Defendants and Appellants.

St. Louis Court of Appeals, May 26, 1891. 46 47 / 58 470

1. **Injunctions:** ASSESSMENT OF DAMAGES: COUNSEL FEES. Upon the dissolution of a temporary restraining order only the necessary counsel fees in obtaining such dissolution can be assessed as damages upon the injunction bond, regardless of the number of counsel actually engaged in the defense.

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2. ——— : ——— : TIME FOR FILING MOTION. When the circuit court, on the final hearing of a cause, dissolves a temporary restraining order made by it therein, and the plaintiff in the cause thereon appeals from the judgment, the motion for the assessment of damages on the injunction bond may be made by the defendant on the affirmance of the judgment by the appellate court; due notice of the motion to the plaintiff, however, is requisite in such case.

3. ——— : EFFECT OF APPEALS: DAMAGES. In the case of such dis-dissolution of a temporary restraining order, and of an appeal from the judgment by the plaintiff, the appeal, though accompanied by a *supersedeas* bond, does not keep the restraining order in force. Accordingly, no damages should, in such case, be assessed upon the injunction bond for the services of counsel in the appellate court.

Appeal from the St. Louis City Circuit Court.—HON. LEROY B. VALLIANT, Judge.

REVERSED AND NEW JUDGMENT ENTERED.

W. C. Marshall, for plaintiff.

Leo Rassieur and *Joseph S. Laurie*, for defendants.

ROMBAUER, P. J.—Both parties appeal from a judgment assessing damages on the dissolution of an injunction. The plaintiff obtained a temporary injunction against both defendants, which the circuit court on final hearing dissolved, dismissing the plaintiff's bill. The plaintiff thereupon appealed to the supreme court, where the judgment was affirmed. Immediately after the dissolution of the injunction the defendants filed separate motions for the assessment of damages, which motions were not acted on by the court at the time, but were continued from term to term presumably to await the issue of plaintiff's appeal. After the supreme court had affirmed the judgment dismissing the bill, the defendants filed a joint motion to assess damages, and, these motions coming on for hearing, the court compelled defendants to elect whether they would proceed on the separate motions or on the joint motion. The defendants elected to do the latter. The plaintiff thereupon moved

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to dismiss the motion, because it was not filed at the term at which the injunction was dissolved. This objection was overruled, and plaintiff excepted. In hearing the evidence on the question of damages, the court, against the plaintiff's objections, permitted the defendants to show the value of legal services rendered in the case to both defendants in the supreme court as well as in the circuit court. To this ruling the plaintiff again excepted, claiming that the damages should be confined to counsel fees in the circuit court in obtaining a dissolution of the injunction.

The defendants introduced evidence tending to show the aggregate value of the services of three counsel in the circuit court and supreme court; but the court ruled that they were entitled to an allowance only for necessary legal services, regardless of the number of counsel employed, to which ruling the defendants excepted. The court found in favor of defendants in the sum of $500, that amount representing necessary counsel fees of the defense in the circuit court and the supreme court.

The exceptions saved by the parties, as above stated, represent the assignment of errors which they now make respectively.

In passing on the defendants' assignment of error, it is proper to say, that the only defendant substantially interested in the proceeding is Thomas. Williams was the recorder of voters, and as such was about to issue a certificate of election to Thomas, but was restrained from so doing at the instance of the plaintiff, who was the incumbent of the office to which Thomas had been elected. Williams had no interest in the controversy one way or the other, and his position was certainly not antagonistic to that of Thomas in any sense. Whether more than one counsel was needed to represent both defendants was at most a question for the court, and the court properly ruled that the value of the necessary legal services to obtain a dissolution of

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the injunction controlled the allowance for such services, and not the number of counsel actually employed. The defendant's assignment of error is, therefore, not tenable.

The plaintiff's first assignment is to the effect, that the court erred in hearing any evidence on the motion, because it was not filed in time.

Where a temporary injunction is dissolved and the bill dismissed, and no further proceedings are had, the damages on the injunction bond should be assessed during the term. We have so intimated in *Loehner v. Hill*, 19 Mo. App. 141, and the supreme court, in referring to that case in *Heffelmann v. Franke*, 96 Mo. 533, said that that ruling was in accord with the prevalent practice in such cases. But it is evident that such cannot be the rule, when the cause is further prosecuted by appeal, since, regardless of the fact whether the appeal operates as a continuance of the injunction, the supreme court may on appeal reinstate the injunction which had been resolved and make it perpetual (*Rose v. Garrett*, 91 Mo. 65), and if it does so all the proceedings in assessing damages are nugatory. As it was decided in *Cohn v. Lehmann*, 93 Mo. 574, that an action on an injunction bond cannot be maintained before final decree is rendered in the case in which such bond was given, there appears to be no reason why the defendant should not wait until final decree, before he moves for an assessment of the damages, provided the plaintiff has due notice of the motion, which in *Heffelmann v. Franke*, *supra*, was deemed an essential requisite to a legal hearing. As in the case at bar, the defendants did file their motions at once upon the dissolution of the injunction in the first instance, and upon the final disposition of the case renewed it, and, as the plaintiff was present in court when the assessment of damages was had, it is not conceivable how he could be prejudiced by the action of the court in proceeding with the assessment of damages at that stage of the

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case. This assignment, therefore, must be ruled against the plaintiff.

The merit of the plaintiff's second assignment is to be determined by the fact, whether an injunction is continued in force by an appeal from a judgment dissolving a temporary injunction and dismissing a bill, the sole object of which is to obtain an injunction. On this question the authorities are not uniform. This court held in *Lewis v. Leahey*, 14 Mo. App. 566, that it has been generally recognized by the profession in Missouri that a restraining order, dissolved by a dismissal of a bill in equity, remains in force pending an appeal from the order dismissing the bill, where the proper steps are taken to obtain a *supersedeas*. The same view was reiterated in *State ex rel. Carroll v. Campbell*, 25 Mo. App. 635, although, in view of the fact that the supreme court denied our jurisdiction in that case, it cannot be regarded as an authority. While the point was not directly involved in *State ex rel. Busch v. Dillon*, 96 Mo. 56, yet, Judge Brace quotes with approval the language of Chief Justice Waite, in *Leonard v. Ozark Land Co.*, 115 U. S. 465: "That neither an injunction nor a decree dissolving an injunction is reversed or nullified by an appeal or writ of error, before the cause is heard in this court," and thus casts some doubt on the position assumed by this court in *Lewis v. Leahey, supra.*

The Kansas City Court of Appeals in *Teasdale v. Jones*, 40 Mo. App. 243, holding the intimation made by the supreme court in *State ex rel. Busch v. Dillon, supra*, to be equivalent to a declaration of law, thereupon pointedly decided that an injunction dissolved on final hearing was not continued by the giving of a *supersedeas* bond on appeal, and, as it is important that appellate courts in this state should adopt a uniform rule on a question so important, we have concluded, in view of the intimation of the supreme court, and the

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express decision of the Kansas City Court of Appeals, to recede from our decision in *Lewis v. Leahey*, *supra*, and to adopt the rule as stated by the Kansas City Court of Appeals.

In *Wood v. Dwight*, 7 Johns. Ch. 295, Chancellor KENT, in speaking on this subject, said: "An appeal only stays further proceedings in the court, but here is no further proceeding. The order is perfect and finished *eo instanti* that it is entered; and, if the injunction could be revived by the mere act of the party in filing an appeal, it would be giving him not only a power of control over the orders of the court, but of creating an injunction." In *Doughty v. Railroad*, 7 N. J. Eq. 629, the question underwent a very full discussion, the judges delivering their opinions *seriatim*. The question was whether the court of errors and appeals could, upon application, continue an injunction which was dissolved on final hearing by the trial court during the pendency of the appeal. Chief Justice GREEN said: "The injunction being dissolved, the appeal cannot revive the process or give it force. It cannot be revived but by a new exercise of judicial power. It is, in effect, the granting a new injunction. It is said that this is an original exercise of judicial power; and unquestionably it is so. It is thereupon objected that this is a mere appellate tribunal, and cannot exercise such power. The consequence does not follow. It may not exercise original power in acquiring jurisdiction over the cause. But that jurisdiction once regularly obtained, this court may exercise original jurisdiction over the parties, especially when the proceeding is *in rem*, and the object of the order to maintain unchanged, as far as practicable, the status or condition of the subject-matter of the controversy during the pendency of the suit."

In Alabama it was decided at an early day in *Garrow v. Carpenter*, 4 Stew. & P. 336, that an appeal from a decree dissolving an injunction does not revive

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and continue the injunction. An appeal lies in that state either from an order dissolving an injunction, or from a decree dismissing the bill, as it now does in this state under the act approved April 18, 1891. In order to avoid hardship in particular cases, the supreme court in that state adopted a rule requiring the chancellor, in cases where he dissolves injunctions, to take bond in form and penalty prescribed by him, which shall restore the injunction during the pendency of the appeal, and it was held in *Ex parte Planters & Merchants' Ins. Co.*, 50 Ala. 390, that the duty of the chancellor to take such bond is imperative and may be enforced by *mandamus*. In most of the American states where the English chancery practice prevails, the power of the appellate courts to reinstate injunctions upon proper terms during the pendency of an appeal is conceded. Such should be the rule in this state, if the rule announced in *Lewis v. Leahey* is abandoned, because many cases necessarily arise where the discontinuance of an injunction during the pendency of the appeal may work irreparable injury. It is to be hoped that, in view of this state of the law, and in view of the recent statute permitting appeals from orders dissolving temporary injunctions, the supreme court will promulgate a rule of practice on the subject, as a guide to inferior courts and litigants in this state.

The views herein expressed lead to a reversal of the judgment, since all the cases concede that such counsel fees only can be recovered as damages in injunction proceedings, as were necessarily incurred in obtaining a dissolution of the injunction. The cause, however, need not be remanded. The evidence preserved in the record is sufficient to enable us to separate the damages illegally assessed from those, to which the defendants are justly entitled. One of the plaintiff's witnesses on his cross-examination states that in this class of cases the value of the services of counsel in the trial court are about two-thirds of the value of the entire services,

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since all the preparation on questions of law and fact have to be made before trial in the lower court. This view accords with our experience. We, therefore, find that the defendants are entitled to a judgment (as of March 10, 1890) of $333.33, damages caused to them by the injunction.

The judgment is reversed, and judgment entered in favor of the defendants for $333.33 in this court, such judgment to bear interest from March 10, 1890, the defendants paying the costs of these appeals. All the judges concurring, it is so ordered.

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46 54 85 637 85 638 JOHANNA M. COUGHLIN *et al.*, Respondents, v. JOHN BARKER, Appellant.

St. Louis Court of Appeals, June 2, 1891.

1. **Conveyances:** EASEMENTS: BUILDING RESTRICTIONS. If the owner of several adjoining lots conveys one of them with a restriction as to the manner of building thereon, and subsequently conveys another, and if said restriction was intended for the benefit of the last-mentioned lot, and not merely as a covenant for the benefit of such owner personally, the grantee of said last-mentioned lot and his assigns can enforce said restriction against every owner of said first-mentioned lot, acquiring title under or through said conveyance of the same, and taking with notice, actual or constructive, of the restriction.

2. ——: ——: ——. In order to render the restriction thus enforceable, it is not essential that the conveyance creating it should express the intention to make it for the benefit of the adjoining land, nor need it be reciprocal; that is, it is not necessary that there should be a similar restriction as to the adjoining land; but the absence of such expression of intention, and even more the absence of such mutuality of restriction, is an evidentiary circumstance tending to show that the restriction was intended by the grantor of the lot subject thereto for his own benefit personally, and not for the benefit of adjoining land retained by him.

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3. ——— : ——— : ———. The question, whether such an easement is a personal right, or is to be construed as appurtenant to some other estate, is generally to be determined by the fair interpretation of the grant or reservation creating it, aided if necessary by reference to the situation of the property and the surrounding circumstances.

4. ——— : ——— : ——— : BURDEN OF PROOF. When a grantee of adjoining land seeks to enforce the restriction, the burden is on him to establish the requisite intention on the part of the grantor of the conveyance by which it is created, and further the requisite notice to the owner of the lot subject to it, against whom the enforcement is sought. And *held* that the terms of the conveyance in the case at bar, when construed with reference to the extrinsic circumstances shown in evidence, did not establish the necessary intention, but only established such an intention conditionally; that is, an intention dependent upon circumstances which never occurred.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL DILLON, Judge.

REVERSED AND REMANDED.

T. K. Skinker, for appellant.

Boyle, Adams & McKeighan, for respondents.

THOMPSON, J.—This is an action in the nature of a suit in equity to restrain the defendant from erecting a house within thirty feet of the lot, adjacent to a lot owned and built upon by the plaintiffs. The court granted the relief prayed for, and the defendant appeals. It appeared from the pleadings and evidence that the plaintiffs held their lot by various mesne conveyances from James M. Carpenter, and that the original deed from Carpenter contained the restriction, that no building should be erected on the lot nearer than thirty feet to the south line of Hogan avenue, which is now Morgan street. It also appeared that the defendant acquired the lot, on which he proposes to build, by various mesne conveyances from Carpenter, and that the original

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deed from Carpenter contained a similar building restriction.

More fully stated, the petition alleged and the evidence showed that, on and prior to the seventeenth of February, 1875, James M. Carpenter was the owner of a parcel of land fronting one hundred and ten feet on the south side of Morgan street, of which parcel a particular description is given in the petition; that, on that day, he conveyed to defendant the east fifty feet of this parcel by a conveyance, which contained a provision that "none other than a stone-front dwelling-house should be erected on said fifty-foot lot, and that no building should be erected on it within thirty feet of Morgan street;" that on the eleventh of August, 1877, Carpenter conveyed to Charles M. Espy another portion of his one hundred and ten feet, being the thirty feet next west of the fifty feet already conveyed to the defendant; that this conveyance contained a provision, that "a building shall not be erected on the lot conveyed nearer than thirty feet from the line of Morgan street, and that the penalty in case of failure to comply shall be reversion to the grantor;" that by mesne conveyances, which are fully set out, the title to this thirty feet passed to defendant, thus showing him to be the owner of the east eighty of the one hundred and ten feet; that, on the eleventh of August, 1877, Carpenter conveyed to Moore, as trustee for Mrs. Field, the remaining thirty feet of the one hundred and ten feet by a deed, which contained a provision that no building should be erected on the lot conveyed within thirty feet of Morgan street; that by mesne conveyances, which are fully set out in the petition, plaintiff Johanna acquired the title of Moore and Mrs. Field to this lot; that plaintiff received her deed with knowledge and on the faith of the restrictions contained in the original deeds from Carpenter; that plaintiffs have erected a dwelling-house on their lot, set back thirty feet from Morgan street; that defendant has recently made an

excavation covering his entire lot, and is about to erect on it buildings fronting on Cabanne and extending northward to the south line of Morgan street; that, as soon as defendant began his excavation, plaintiffs notified him that they would insist on his observing the building line; but that defendant nevertheless was proceeding to build regardless of the line.

It also appears that the lot of defendant lies immediately east of the lot of the plaintiff. The lot lying immediately west of the lot of plaintiff was originally granted by Carpenter, but without any such building restrictions. It appeared in evidence that the city block, in which the lots of the plaintiff and the defendant are situated, originally extended from Grand avenue on the east to Vandeventer avenue on the west, having a frontage of about twenty-two hundred and forty-four feet on the south side of Hogan avenue. Of this frontage, about fifteen hundred and eighty-four feet were owned by Carpenter, about five hundred and fifty feet by one Kaime, and about one hundred and ten feet by one Hereford. The evidence was to the effect that Carpenter, desiring to make of his property a high-class residence property, and with the view of enhancing the price which he should obtain for the lots, determined to insert certain building restrictions in the deeds of lots conveyed by him, and that among these building restrictions was one, that no dwelling should be erected so that its front line should be nearer than thirty feet from the south line of Hogan avenue. It further appeared that the other proprietors of the ground, already described, did not concur with Carpenter in his scheme. It also appeared that the proprietors on the opposite side of Hogan avenue declined to face their lots upon Hogan avenue so as to make an elegant street of that avenue, but persisted in building with their houses faced toward the north, so that the rear of their houses and their back yards were presented to the front view of the dwellers on the south side of Hogan avenue,

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including the plaintiffs and defendant. Then came a subsequent improvement in the form of a cable railway, which was extended through Hogan avenue, and which had the effect of introducing such noise, dirt and traffic as to make the place in question generally undesirable as residence property. In the meantime Carpenter, finding himself unable to carry out his scheme, conveyed various lots by deeds which contained no building restrictions whatever; so that out of ten other lots conveyed, aside from those acquired by the plaintiffs and the defendant, amounting in the aggregate to six hundred and one out of his fifteen hundred and eighty-four feet, seven contained no building restrictions whatever, while only three provided that no building should be erected nearer than thirty feet to the street. One of the two provided, in addition, that no stable should be erected nearer than forty feet, and one provided that no stable should be erected nearer than fifty feet from the street. Of the seven conveyances which contained no building restriction, one conveyed the lot adjoining the plaintiffs' lot on the west, and another conveyed the lot adjoining the defendant's lot on the east; but this has since become Cabanne street. Since Carpenter attempted this scheme of improvement, a new street has been put through the property north and south midway between Grand avenue and Vandeventer avenue, called Cabanne street. Carpenter himself still retains much of the land originally owned by him, and on a portion of it he had built a residence house for himself. This house lies to the east of the plaintiffs' lot, and Cabanne street and three other building lots, including that of the defendant on which he now proposes to build, intervene. Before taking any steps to erect this building which is now sought to be enjoined, the defendant, proceeding upon the conception that the building restriction in the original deed from Carpenter, under which he held, was intended for Carpenter's sole benefit, procured the consent of Carpenter that he might build up to the line

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of Morgan street; and, after the commencement of this action, he obtained from Carpenter a deed releasing him from the restrictive covenant in Carpenter's original deed.

It appears very clearly from the evidence that Carpenter conceived the plan, in the year 1875, of making this a very desirable residence property; but that, in order to do so, he had to have the concurrence of several proprietors, including the Vandeventer heirs, who owned the property on the north side of Hogan avenue; that he failed to obtain the concurrence of the Vandeventer heirs, and for that reason, and for other reasons stated in his testimony, his scheme entirely fell through. His testimony shows that, by reason of the fact that many houses have been built on Vandeventer place with their fronts to the north, and their back buildings to Hogan avenue, and their stables and out-buildings abutting on Hogan avenue; by reason of the establishment of the cable railway through Hogan avenue, and from other causes, that avenue has become "disagreeable, offensive, noisy and dangerous, and is no longer a thoroughfare in general use, and is seldom used by pedestrians, or by vehicles other than the cable cars, and is now a street of very inferior character for residence purposes." His testimony shows that his purpose in inserting the restrictive covenant as to the building line in the original deeds, under which plaintiffs and the defendant respectively claim, was to retain control of the mode of building in the place, with the view of carrying out the scheme of improvement which he then contemplated, but which he was subsequently compelled to abandon for the reasons stated.

It is further to be noticed that these covenants were not reciprocal; Carpenter on his part entered into no covenant to observe a thirty-foot building line in respect of the land which he retained, and he has disregarded that line in building his own house on one of

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the lots reserved by him. He still retains more than half of his original holdings in that general property.

This case has been presented by counsel on both sides in such a manner as to aid the court very materially in the investigations necessary to its decision. Its decision has been delayed with a view of obtaining enough consecutive time to make a careful examination and comparison of all the authorities presented for our consideration on both sides. These authorities, and several others, have been carefully examined and compared. They consist of decisions in equity in English and American courts on the question of the enforcement in equity of building restrictions. They are numerous, complicated in their facts, and by no means harmonious either in their reasoning or in their conclusions. We approach the decision of this case with the feeling, acquired by the careful reading and comparison of those authorities, that a judicial opinion could be constructed on either side of this controversy, well supported by authority, and apparently supported by reason. After giving to the subject careful consideration, we have come to the conclusion that the latest and best judicial opinion upon this subject, in England and in this country, is opposed to the right of the plaintiffs to enforce against the defendant the building restrictions in the deed from Carpenter, under which the defendant claims. We lay all other considerations out of view, and rest our conclusion on a fact, which is made controlling and decisive in a number of modern cases, English and American, that it does not appear from the language of the deeds, in which the original building restrictions applicable to the respective lots of the plaintiffs and the defendant were contained, when construed with reference to the extrinsic circumstances shown in evidence, that it was the intention of the parties to the deed, under which the defendant claims, to insert that restriction in the deed for the benefit of the plaintiffs' lot.

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We fully concede the general rule which is invoked in behalf of the plaintiff. That rule is that, where the common grantor of two adjoining lots sells one and retains the other, and puts in the deed of the one which he sells a covenant against building in a certain way, which covenant is manifestly intended for the benefit of the lot which is retained, and he afterwards sells this lot to another the covenant passes to the assign of such lot as an appurtenance to it, or as an easement for the benefit of it, and such assign may enforce it against the owner of the other lot, whether he acquired the other lot immediately from the original vendor or through mesne conveyances, or by devise, descent, or otherwise, from him; provided he took with notice of it, actual or constructive. *Tulk v. Moxhay*, 2 Phil. 774; *Mann v. Stephens*, 15 Sim. 376; *Whatman v. Gibson*, 9 Sim. 196; *Hills v. Miller*, 3 Paige, 254; *Barrow v. Richard*, 8 Paige, 243; *Browner v. Jones*, 23 Barb. 153; *Tallmadge v. Bank*, 26 N. Y. 105; *Linzee v. Mixer*, 101 Mass. 512; *Gilbert v. Peteler*, 38 N. Y. 165; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Watrous v. Allen*, 57 Mich. 362; *St. Andrews Church's Appeal*, 67 Pa. St. 512; *Clark v. Martin*, 49 Pa. St. 289, 297; *Sanborn v. Rice*, 129 Mass. 387; *Whitney v. Railroad*, 11 Gray (Mass.) 359; *Jeffries v. Jeffries*, 119 Mass. 185; *Parker v. Nightengale*, 6 Allen, 341; *Peck v. Conway*, 119 Mass. 546; *McLean v. McKay*, 21 Week. Rep. 798; *Western v. McDermot*, L. R. 1 Eq. 499; s. c., affirmed, L. R. 2 Ch. 72; *Manners v. Johnson*, 1 Ch. Div. 673; *Coles v. Sims*, Kay, 56; *Child v. Douglas*, Kay, 560. Such a restriction in the land conveyed is generally construed to have been intended by the parties to the deed for the benefit of the land retained by the grantor in the deed, since in most cases it could obviously have no other purpose. Nor does it defeat this conclusion, that the purpose is not expressed in the deed, or that the deed contains no reciprocal covenant on the part of the grantor to observe a like restriction in respect of the land retained by him. In order that

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the land retained by him should enjoy the benefit of the restriction imposed upon the land conveyed, it is not at all necessary that a similar restriction should be imposed upon the land retained. *Child v. Douglas*, Kay, 560. To illustrate this, let us suppose the case of the owner of two adjoining lots, desiring to build upon the one and willing to sell the other. He sells the other with a restriction for a certain building line, but he imposes upon himself no restriction to observe the same building line in respect of the lot which he retains. He builds upon his own lot to the line of the street, and he enforces the restriction against his grantee by which he is obliged to build back to the building line. It can be well seen that the grantor may intend this restriction for the mere purpose of retaining for himself a greater easement of light and view, without imposing upon himself a similar restriction.

Nor is it at all material to the right of a plaintiff to have such a restriction enforced in equity, that it should be a covenant running with the land. *Tulk v. Moxhay*, 2 Phil. Chan. 774, 777; *Keates v. Lyon*, L. R. 4 Chan. 218; *Child v. Douglas*, Kay, 560. The question, whether the covenant runs with the land, seems to be material in equity only on the question of notice; if the covenant runs with the land, then it binds the owner of the land, whether he had knowledge of it or not; for he takes no greater title than his predecessors had to convey. But, if the covenant does not run with the land, but the land is subject to what is sometimes called an "equity," and at other times a "negative easement," in favor of the adjoining land, then, in order to enforce this easement against the land, it is essential that the owner should have taken the land with notice of it. *Tulk v. Moxhay*, 2 Phil. Chan. 774.

We understand, then, that it is a principle upon which all the court unite, that the right to equitable relief in these cases depends upon the following considerations: *First*. A precedent agreement, in some form,

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by which a restriction is imposed upon the lot owned or held by defendant for the benefit of the lot owned or held by the plaintiff. *Second.* In case the agreement is made by the defendant's predecessor in title, *notice* in some form to the defendant of the fact and nature of the agreement, either from the language of the title deed under which he holds, or otherwise.

It follows that in every such case the initial inquiry is, whether the building restriction sought to be enforced in equity was imposed upon the lot owned by the defendant for the benefit of the lot owned by the plaintiff. It equally follows that, if this inquiry is answered in the negative by the evidence, all other questions must be laid out of view, and equitable relief must be denied.

In determining this question it must be conceded that there is, at the outset, in every case where the owner of a piece of property divides it and sells a part of it, imposing upon his vendee a restriction as to its use, a presumption that he imposes such restriction for the benefit of the part which he retains. Yet this conclusion is by no means universal; circumstances may exist in many cases which clearly repel it, or under which a court of equity will not be justified in saying that such was the purpose of the vendor, and the assent of his vendee. One authoritative court has gone so far as to hold that the restriction need not be contained in the form of a covenant at all, or even in the form of restrictive language in a deed of conveyance, but that it may rest in a parol agreement among the antecedent owners of the several lots, so as to bind one of the present owners, provided it clearly appears that he acquired his lot with notice of the agreement. *Tallmadge v. Bank*, 26 N. Y. 105, 107.

In every case there is a very strong argument in favor of the view that, such restrictions ought to be construed as imposing what is termed a *negative easement* upon the land conveyed for the benefit of the land retained, or what is sometimes termed an *equity* in the

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land retained as against the land conveyed. To the argument, that the grantor intended the restriction for his own personal benefit, and that it was a mere personal covenant, and not a covenant running with the land, it may generally be answered that the grantor could not intend it for his own personal benefit, except for his benefit *as owner of the land retained*, and that he should be benefited by it from no other circumstance than from the circumstance that it benefited the land which he retained. In dealing with this subject, equity does not concern itself with the form of the language in which the restriction is couched, but deals only with its substance. It disregards the inquiry whether it is a condition or a covenant, and enforces it when it was plainly intended by the parties that it should be for the benefit of the land held by the plaintiff.

The question, whether such an easement is a personal right, or is to be construed to be appurtenant to some other estate, is generally determined by the fair interpretation of the terms of grant or reservation creating the easement, aided if necessary by reference to the situation of the property and the surrounding circumstances. *Peck v. Conway*, 119 Mass. 546. It is important, in determining the question, to confine the evidence to the terms of the deed which contains the restriction, and to evidence of such surrounding circumstances as could readily be ascertained by a subsequent purchaser, when put upon inquiry by the terms of the deed itself. If it is the intent of the restriction in the deed to impose a servitude upon the property for the benefit of an adjoining tract of land, the conveyance ought to express that intent in the deed, though, as already stated, this is not indispensably necessary to the conclusion that such was the intent. On this point it has been observed: "In the absence of any words in the deed to this effect, or any reference to a plan showing a general scheme of improvement, the grantees took their estate without any notice, express or constructive,

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that the restriction was intended for the benefit of the adjoining estate. For anything that appears, it may have been intended only for the benefit of the grantor, and for his personal convenience." *Skinner v. Shepard*. 130 Mass. 180, 181.

It is with reference to this principle that the fact that the restriction contained in the particular deed was a part of *a general plan* becomes of the greatest importance, and, in many cases, controlling. But it ought to be carefully added that the fact that there is no evidence that a particular restriction was part of a general plan does not necessarily negative the conclusion that it was intended for the benefit of a particular adjacent estate. The situation of the two parcels of land in respect of each other may be such as to render such a conclusion unavoidable, as, for instance, where a vendor sells one adjoining parcel, with an agreement not to build upon the other, in which case the conclusion is unavoidable that he annexes to the parcel sold an easement of light, air and view, in respect to the parcel retained. But where the restriction is no part of a general plan, and there is nothing in the language of the deed, when interpreted by surrounding circumstances, from which it can be fairly inferred that the restriction was intended for the benefit of any particular piece of land retained by the vendor, the covenant cannot be enforced by one who subsequently acquires from the vendor the particular piece of land, or by the vendor for the exclusive benefit of such subsequent purchaser. *Dana v. Wentworth*, 111 Mass. 291. In the present case the deed makes reference to no general plan or scheme of improvement. Its language fails to put a successor in title upon inquiry as to the existence of any such general plan or scheme. In point of fact there was no such general plan or scheme, except an inchoate and unmatured plan or scheme, in the mind of Carpenter; and, although this appears to have been a

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matter of general notoriety at the time, it was not carried out, but became abortive, as already stated, and for the reasons stated. The building restriction in the deed under which the defendant claims is not even referable to any partial plan which Carpenter may have had in his mind at the time, because the five lots, the deeds of which contain such building restrictions, do not stand together in a body, but are scattered among intervening lots which contain no such restrictions.

It has been further observed that, in determining whether such a restriction was intended for the benefit of particular adjacent lots or parcels of ground, an important evidentiary circumstance is that similar restrictions were inserted in other deeds conveying such other lots or parcels, or that the deeds conveying such other lots or parcels contain reference to the restrictive clause in the particular deed. In the case before us the deed, by which Carpenter parted with the lot which the plaintiff now holds, did not contain such a restriction, and this is an evidentiary circumstance in their favor. But it does not appear that it made any reference to any similar building restrictions in any other deed, or that the deed under which the defendant claims, or any other deed of Carpenter containing similar restrictions, referred to the fact that similar restrictions had been imposed upon the grantees of other parcels. The deed, therefore, fails to afford intrinsic evidence of a general scheme of improvement, establishing a common building line, and the fact that grants were made of intervening parcels by deeds containing no such restrictions negatives the conclusion that there was, at the time when the deed, under which the defendant claims, was made by Carpenter, such an established or matured scheme. Of course, we do not wish to be understood as holding that, where the manifest intention of the parties to a deed is to grant a negative easement for the benefit of land retained by the grantor, it is necessary that this purpose should be

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expressed in the deed. The contrary has been held in authoritative cases. *Mann v. Stephens*, 15 Sim. 376; *Patching v. Dubbins*, Kay, 1; *McLean v. McKay*, 21 Week. Rep. 798. We merely hold that the omission from the deed of such an expression is an evidentiary circumstance, to be taken into consideration in proceedings of this kind.

It is further to be kept in mind that in this case there was no mutuality of covenant. Carpenter sold to the defendant's predecessor in title a thirty-foot lot, containing this restriction as to the building line, but he imposed no such restriction on the lots that he retained; nor did he impose such restrictions on a majority of the lots that he subsequently granted to others. This in itself is a strong evidentiary circumstance tending to the conclusion that the purpose in imposing the restriction was intended to be personal to himself. Where the covenants are mutual, there is no difficulty whatever in dealing with this question. Thus, where the owner of a particular piece of land, on which a row of houses is intended to be built, executes a deed, reciting that it has been laid out and is intended to be dealt with in a particular manner, and declares that it shall be a general and indispensable condition of the sale of all or of any part of the land that the several proprietors for the time being shall observe and abide by the several restrictions and stipulations therein contained, and that he, himself, will at all times observe the like restrictions and stipulations; and these restrictions and stipulations are also enforced by mutual covenants, although the question may afterwards arise between subsequent purchasers of different portions of the land, one of the subsequent lot-owners will be bound, and another will be entitled to enforce the covenant. *Whatman v. Gibson*, 9 Sim. 196. Of course, we do not wish to be understood as intimating that mutuality of covenant is at all necessary to enable the owner of the land, for whose benefit the restrictive covenant, in

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respect to the other lot, was made, to have the covenant enforced in equity. The rule is quite clearly settled to the contrary, and without any difference of opinion so far as we know. *Hall v. Wesster*, 7 Mo. App. 56. On this subject it was observed by Sir W. PAIGE WOOD (afterward Lord HATHERLY): "I have felt some difficulty throughout in seeing how reciprocity could have anything to do with the question. Where a part of the remaining property of the vendor has been sold to another person, who must be said to have bought the benefit of the former purchaser's covenant, and more especially when the subsequent purchaser has entered into a similar covenant on his own part, he must be said to have done this in consideration of those benefits; and, even whether he actually knew or was ignorant that this covenant was, in fact, inserted in the other purchaser's deed, because he must be taken to have bought all the rights connected with this portion of the land." *Child v. Douglas*, Kay, 560, 569, 571.

In Massachusetts, where the equitable grounds upon which the plaintiffs predicate their right to relief have been expounded and enforced as broadly as in any other jurisdiction, several decisions have been rendered which illustrate and enforce the foregoing conclusions, and which show that the plaintiffs are not entitled to relief in this case. In one of these cases it appeared that D., being the owner of several parcels of land, which were described upon a plan which had been recorded in the registry of deeds, conveyed to the defendants in fee simple a certain parcel, numbered 3 on the plan, with the building thereon, by metes and bounds and subject to the following restriction, "that no out-buildings or sheds shall ever be erected westwardly of the main line, of a greater height than those now standing thereon." Thereafter D. conveyed the parcel or lot, numbered 4 on the plan, to R., with all rights, easements, privileges and appurtenances thereupon belonging; and the lot afterwards came, through mesne

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conveyances, to the plaintiff. It was held that the plaintiff was not entitled to the aid of equity to enforce against the defendant the restriction contained in the deed of D. to the defendant. The court speaking through BIGELOW, C. J., said: "The infirmity of the plaintiff's case is that there is nothing from which the court can infer that the restriction in the deed from Downing was inserted for the benefit of the estate now owned by the plaintiff.

In another case in the same state it appeared that, in 1834, the plaintiff conveyed to one Nudd a certain parcel of land, upon condition, "that the grantee, nor his heirs or assigns will not at any time build, or permit to be built, any building upon said lot, nearer to either of said streets (the boundary streets) than eight feet," etc. Afterwards this parcel was divided into three lots, each fronting on Auburn street. Long afterwards, Mrs. Niles became owner, by mesne conveyances, of one of these lots, by a deed of release which contained the proviso, "that no building shall ever be erected, or suffered to stand upon the afore-described piece of land, or any parcel thereof, contrary to the provisions of said condition; but a breach of this prohibition shall in no case work a forfeiture, but shall be conclusively deemed a nuisance, for which I, my heirs or devisees shall be entitled to enter and abate without process of law, and shall likewise be entitled to damages against the party or parties offending, but against no others, and also to any and all other remedies at law or in equity." This deed was recorded. Still later Whitney became possessed, by mesne conveyances, of another of the three lots, and conveyed it to the defendant. At the time of the conveyance to Mrs. Niles, the then owner of the defendant's lot did not know of the first deed spoken of, and neither he nor any of those succeeding him in the ownership of the lot had ever consented thereto. It was held that the plaintiff, the original convenantee, could not maintain a suit in

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equity to restrain the defendant from building on his lot within eight feet of Auburn street. In giving the opinion of the court, Mr. Justice GRAY said: "There is nothing in the case to show that the restriction in the deed from the plaintiff to Nudd was part of a general plan for the benefit of the land thereby granted and other estates on the same street, or was inserted in the plaintiff's deed for the benefit of the grantee or his assigns, or was repeated in any grant or covenant executed by him or them, or either of them. Under these circumstances, a purchaser from Nudd of part of the land so granted to him has no more right in equity than at law to enforce the restriction against the purchaser of another part of the same land." *Dana v. Wentworth*, 111 Mass. 291, 293.

In another case in the same state it appeared that the owner of the land, lying on both sides of a street, granted the portion on one side which bordered upon the ocean, subject to the condition that the same should be used only for bathing and boating from the beach, and that only low bathing houses should be built thereon. It did not appear that he then intended that the land so granted should be subsequently divided and held by different owners. This, however, was done, and deeds of conveyance were made subject to the condition. The purchaser of one end of the land also purchased from a stranger a lot opposite thereto, on the other side of the street. It was held that such purchaser could not maintain a bill in equity against the purchaser of another portion of the land to restrain the latter from violating the condition. The court proceeded upon the view stated in the preceding paragraph; and in the course of its opinion, given by BIGELOW, C. J., it is also said: "There is nothing in the case before us which in any degree tends to show that there was any intent on the part of the grantor and grantee in the original deed, by which the condition was annexed to that grant of the land now owned by the

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parties to this suit, to give any other or different effect to the condition than that which would result from it at common law. It does not appear that the original grantor had in contemplation the division of the land into separate lots or parcels which would be held by different owners, or that the condition was inserted in the grant for the purpose of creating a restriction on the use of the land as between subsequent grantees of different lots or parcels thereof." *Jewell v. Lee*, 14 Allen, 145, 150. This case differs from the one before us in this: There the owner had no intention, at the time of the deed, to divide up the land and parcel it out to different owners upon a general scheme; while here there was such an intention, which proved abortive, because the concurrence of other land-owners in the scheme could not be secured.

Another case in Massachusetts, where equitable relief was denied, was considerably like the present case in several of its features. It appeared that J. S., the owner of a tract of land, laid it out in lots, and recorded in the registry of deeds a plan, showing the streets and lots with their dimensions. On the north side of one of the streets were five lots, numbered consecutively from six to ten, and on the south side a large lot. J. S. conveyed this large lot without restriction, and built a house on lot 10, standing twenty feet back from the street. He then conveyed lot 8 and part of lot 7 to the plaintiff's grantor by deeds containing a provision that, for fifteen years, no building should be placed on the granted premises within twenty feet of the street; that no trade offensive to dwelling-houses in that neighborhood should be carried on; and that a violation of either of these restrictions should not work a forfeiture, but that J. S., his heirs or devisees might enter upon the land and remove anything violating the restrictions. J. S. afterwards conveyed the rest of lot 7 and also lot 6 to the defendant, by deeds containing the same provision. The court held that the plaintiff

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could not maintain a bill in equity to restrain the defendant from erecting a building on lot 6 within twenty feet of the street. It was not claimed that, in regard to any of the lots, there was any written covenant by the grantor, and it did not appear that there was any express stipulation or direct assurance on his part that any person who should purchase a lot on the north side of the street should have the benefit of a restriction, binding all the other purchasers, to leave an open space between their dwelling-houses, and the street. The court, speaking through AMES, J., said: "The only ground upon which the plaintiff can rest her claim that the restriction in question was intended to operate for the benefit of all the purchasers, and to establish a general plan of building, by which each one would acquire a right in the nature of an easement in the land purchased by the others, is to be found in the fact, that, in his transactions with two separate and independent purchasers, the grantor conveyed a portion of the land in each case, subject to the terms and conditions set forth in the bill of complaint. It is true that, of these conditions, the one prohibiting the prosecution of any offensive trade or manufacture upon the premises, or the using of them for the keeping of swine, or of a livery-stable, would in practice be beneficial to the neighborhood generally. But it is to be remembered that the grantor had himself built a dwelling-house in that immediate neighborhood, and the provision which he made for the prevention of nuisances may have been intended for the benefit of that particular house. * * * No such purpose can be gathered from the plan, or from the situation of the property with reference to other land of the grantor. It purports to be a condition imposed by the grantor, and the deed points out the mode in which he, his heirs or devisees may enforce it. Neither of the deeds, under which these parties respectively claim, purports to give to the grantee any such right against any other grantee. For aught

that appears, the condition may have been intended for the benefit of the grantor or his family, as long as they continued to own the dwelling-house. The burden of proof is upon the plaintiff, if she insists upon giving to that condition any wider application, and this burden we do not find that she has sustained." *Sharp v. Ropes*, 110 Mass. 381, 385.

In a modern case in the English chancery division, the court denied relief, on a similar line of thought upon the following state of facts: The owner of an estate granted a lease of a plot of ground to A., who covenanted that he, his executors, administrators and assigns would not, during the term, do on the premises anything which should be an annoyance to the neighborhood or to the lessor or his tenants, or which should diminish the value of the adjoining property, and that he would not build, or allow to be built, on the ground any building or erection, without first submitting the plans to the lessor and obtaining his approval. Some years later the landlord granted a lease of an adjoining plot to B., who entered into a similar restrictive covenant. Within twenty years, A. commenced, with the approval of the lessor, to build upon his ground so as to darken the windows of B.'s house. B., thereupon, brought a bill in equity to restrain A. from erecting, and also to restrain the lessor from approving, the building which A. was about to erect. The court held that B. was not entitled to relief, either on the principle that the lessor could not derogate from his grant, or on the ground that the restrictive covenants in A.'s lease inured to the benefit of B. *Master v. Hansard*, 4 Chan. Div. 718. The case of *Schreiber v. Creed*, 10 Sim. 9, supports to some extent the same conclusion.

There is another ground upon which the courts of equity, both in England and America, have denied relief in these cases. It is that equity will not lend its aid where the covenants were inserted in pursuance of a scheme of improvement, *which has afterwards been*

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abandoned, or where the circumstances surrounding the property have so entirely changed in other respects as to render the enforcement of the covenant *inequitable*—in other words, so that its enforcement would entail greater injustice than it would remedy. This principle has been recognized and acted upon in these cases by the English courts of equity ever since the decision of Lord ELDON in the celebrated case of the *Duke of Bedford v. Trustees of British Museum*, 2 Milne & K. 552. See, for instance, the recent case of *Sayers v. Collyer*, 24 Ch. Div. 180. These cases have generally denied such relief *to the original covenantee*, on the ground that he has changed the condition of the property by his affirmative action, by his consent, or by his neglect, so as to render it inequitable for *him* to enforce the covenant; in other words, he is regarded as *estopped* from enforcing it. Such was the case of the *Duke of Bedford v. Trustees of British Museum*, *supra*. The theory of the court is stated by Lord ELDON in a subsequent case: "Every relaxation which the plaintiff has permitted in allowing houses to be built in violation of the covenant amounts *pro tanto* to a dispensation of the obligation intended to be contracted by it." *Roper v. Williams*, Turn. & Russ. 18, 22.

Of this the most striking illustration which has come under our notice is a decision of the court of appeals of Kentucky, which, upon some of its facts, is very much like the case now under consideration. In that case it appeared that a man, owning certain unimproved city property, laid it out on a plan by which it was intended to be sold for residences only. He sold and conveyed several of the lots to A. with a clause in the deed containing the restriction against business houses, manufacturies or anything other than dwelling-houses, being erected upon the property. He afterwards sold other lots to different persons, without any restrictions whatever, and he made mortgages of the rest

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of the property without any restrictions therein. Thereafter A. conveyed the lots, which he had thus purchased, to a street-railway company,, and they commenced the erection thereon of a stable for their horses. It was held that the *original vendor* was not entitled to have the railway company enjoined from erecting and maintaining their stable, since the evidence showed an abandonment on his part of the original purpose in respect to the land which induced him to insert the above restriction, and since no vendee of his was complaining.

It must be conceded that this principle can have no application to a case, where it is clear that the original vendor or lessor has inserted the covenant in the deed for the benefit of adjacent land retained by him, which he has afterwards sold, and which has subsequently come into the hands of the party seeking to enforce the covenant; because it is not competent for him to derogate from the rights which he himself has granted. *Child v. Douglas*, Kay, 560, 572. Yet, where it is not clear that such was his intention, and where the circumstances are not such as to make it clear that a subsequent purchaser would so understand it, the principle as already seen has been applied as against the vendees of the original covenantee, no less than against the original covenantee himself.

An illustration of the fact that equity will not enforce such a covenant, where the circumstances have so changed as to defeat entirely the reasons upon which it was originally founded, without any reference to the fault of the original covenantee, is found in a decision of the court of appeals of New York, where the trustees of Columbia College had conveyed property by deeds, reciting the object which the parties to the conveyance had in view to be "to provide for the better improvement of the said lands, and to secure their permanent value;" and the parties mutually covenanted for

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themselves, their heirs and assigns, that only dwelling-houses should be erected upon their respective premises, and that neither would permit or carry on any stable, schoolhouse, engine-house, tenement or community house, or any kind of manufactory, trade or business, on any part of said lands; but it appeared that, at the time of the hearing of the suit in equity to enforce the covenant, the neighborhood had become so changed by the growth and extension of business houses, and by the erection of an elevated railroad running opposite the second-story windows of the house, as to render it undesirable for residence purposes, but, nevertheless, valuable for business purposes. It was held that the entire purpose for which the covenant was inserted in the deed having failed, equity would not decree its enforcement, but would leave the plaintiffs to their remedy at law. *Trustees of Columbia College v. Thacher*, 87 N. Y. 311.

Unless we misunderstand and misapply these principles, the plaintiffs, in order to succeed, must make it appear to our satisfaction that the covenant in the deed from Carpenter, under which the defendant claims, was inserted in the deed for the purpose of creating a negative easement in favor of the ground which includes plaintiffs' particular lot, and that the circumstances were such as to impart to the defendant notice, from the terms of the deed, that such was its purpose. We do not think that this sufficiently appears. The language of the deed does not disclose any such purpose. The other deeds made by Carpenter do not disclose any general and consistent purpose to restrict the grantees to a common building line, because, as already stated, a majority of them contain no such restriction at all. The conclusion, that in inserting the restriction under which the defendant claims, it was the purpose of Carpenter to impose upon the property a servitude for the benefit of the particular lot which the plaintiff subsequently acquired, is also negatived by the further fact,

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that Carpenter inserted no such restriction in the deed by which he conveyed the lot immediately west of the plaintiff's lot; nor in the deed by which he conveyed the second lot east of the plaintiff's lot,—that is to say the lot immediately adjoining the defendant's lot on the east. Carpenter undoubtedly intended to impose this restriction upon the use of the defendant's lot for the general benefit of the land retained by him in that place. But he intended it *sub modo*, so to speak; he intended it, provided he could carry out his scheme of improvement, and he did not intend it in contemplation of what subsequently happened.

We do not, of course, shut our eyes to the fact, that for the defendant to build in disregard of the restriction in the two deeds under which he claims will work considerable damage to the plaintiffs. The lot-owner immediately on the west side of the plaintiffs is at liberty to build out to the line of the street, and so is the lot-owner immediately on the east side of the defendant across Cabanne street. There thus lies east of the plaintiffs a frontage of one hundred and forty feet extending to a lot retained by Carpenter, and on which Carpenter has built out beyond the building line, in which space of one hundred and forty feet the plaintiffs would have this easement of view to the east, if we were to grant the relief for which they pray. If this relief is not granted, their house is liable to be left in a pocket, so to speak, but thirty feet wide, the width of their own lot, in case the owner flanking them on the west should take the notion of building out to the line of the street, he being under no covenant not to do so. But a glance at the map, in connection with the evidence, will show that the tracts of ground subjected to this building restriction break out in three places, so to speak,—one (that in question) on the west side of Cabanne street, and the other two at a distance from this one and from each other on the east side of that street,—thus showing an entire absence of a consummated, consistent plan.

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Then, as to the facts disclosed by the plaintiffs' evidence, the truth of which we cannot doubt, that, when they purchased their property, they were informed by the real-estate agent through whom it was sold to them that there was a thirty-foot building line established there, we must say that the state of facts above set out shows that the agent was in error in giving to the plaintiffs that information. There was no such *general* building line; there was only the restriction in regard to the two lots immediately to the east,—of fifty and thirty feet respectively, which composed the aggregate lot on which the defendant proposes to build. If, therefore, the plaintiffs, as we must hold to have been the case, purchased on the faith of there being a general building line, they are in the unfortunate situation of having purchased on erroneous information.

There is another view: The evidence makes it strongly appear that the principal damage, which the plaintiffs will suffer, grows out of the peculiar manner in which they have built their house. They have built it back of the supposed thirty-foot building line, and have inserted a side door in it, on the east side, about the middle of it, according to the manner in which many houses are built in St. Louis; and so that, if the defendant continues to build his house as he has begun it, the side door of the plaintiffs will look into the rear door of the defendant. This is unfortunate for the plaintiffs, but our decision has some compensation for them; they also will be at liberty to extend their house nearer to the street at any time when they shall see fit to do so.

We do not shut our eyes to the fact, that the plaintiffs' position is very strong and very logical. It is simply this: That in imposing this restriction upon the lot, which afterwards passed into the ownership of the defendant, Carpenter must have intended to impose it for the benefit of the property immediately adjoining, since it could have no other object than to afford an easement of light, air and view to such property, and

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that, having imposed these restrictions for the benefit of such other property, those who subsequently acquired that property have a right to claim the easement, notwithstanding any subsequent changes which may have taken place in the neighborhood, notwithstanding any subsequent failure in the plans of Carpenter, and notwithstanding the fact that he did not see fit to impose it upon himself in respect of the property which he retained, or to impose it on all of his grantees. It is undeniably logical, that no subsequent change of circumstances, and especially no subsequent release by Carpenter, would derogate from the grant of such an easement, if that was the character of the grant. But we proceed upon the view that this was not the character of the grant; that the restriction was not intended for the benefit of any particular lot, but was conceived as a part of a general scheme of improvement, and was not intended to be operative unless that scheme should be carried out.

Upon the whole we are, therefore, of the opinion, though not without considerable doubt and hesitancy, that we must reverse the judgment of the circuit court, and remand the cause, with directions to enter judgment for the defendant, dissolving the injunction and dismissing the suit. It is so ordered. All the judges concur.

AUGUSTUS O. GIRARD, Respondent, v. THE ST. LOUIS CAR-WHEEL COMPANY, Appellant.

St. Louis Court of Appeals, June 2, 1891.

1. **Pleading:** RELEASE PROCURED THROUGH FRAUD. A plaintiff, who has been induced by fraud or undue influence to release his right of action, may sue upon such right of action without first obtaining the annulment of the release by suit in equity; and if such release is pleaded as a defense to his action at law he may in his reply set up the fraud or undue influence in avoidance of it.

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2. **Release:** SUFFICIENCY OF EVIDENCE OF FRAUD. Such a release stands upon the footing of a compromise, and should be upheld when fairly made. It should not be vacated for fraud in an action at law, unless the evidence of the fraud, if believed, and the circumstances attending its execution, are such as would warrant a chancellor in setting it aside. And *held* that the evidence in this cause was sufficient under this rule.

3. **Fraud:** UNUSUAL PROVISIONS IN A RELEASE. An unusual provision in an instrument, whereby the draftsman of the instrument obtains an advantage over the other party, excites suspicion of a fraudulent motive. This rule is applied herein to a provision in the release of a cause of action, stating that the party making the release agreed to release "deliberately, of his own free will, and without any undue influence from anyone."

4. ——— : RESCISSION OF CONTRACT: RESTORATION OF BENEFITS RECEIVED. If a party to a contract seeks to have it annulled because he was induced to enter into it by fraud, he must ordinarily restore to the other party the consideration received by him under it; but he is not bound to restore such consideration, where the contract consists of the release of a cause of action on his part, and the consideration received was less than what is due him for such cause of action.

5. ——— : ———. If a party to a contract does not labor under a disability or infirmity, his mere failure, through his own fault or neglect, to read it or inform himself of its contents, is not sufficient to annul it or overcome its legal effect as to him.

6. **Instructions:** NEGLIGENCE. An instruction was predicated upon the hypothesis of negligence on the part of the defendant in raising a weight, when, strictly speaking, the injury sued for resulted from the want of ordinary care in attempting to get the weight down after it had been partly raised with an insufficient appliance, and could not safely be raised any further. *Held*, that an assignment of error on the ground of such distinction was too refined for practical purposes, and that the giving of the instruction did not constitute prejudicial error.

7. ——— : EXCESSIVE NUMBER. The defendant in the cause offered seventeen instructions. *Held* that, under the issues of this cause, that number was excessive, and that the trial court might properly have refused all of them for that reason.

8. **Negligence:** MASTER AND SERVANT. A crane for the raising of heavy weights was firmly attached to a foundry building, and used in connection with the foundry business. While a very heavy weight was being raised with it by employes at the foundry, the building began to crack, owing to the strain to which it was subjected. Thereon the superintendent of the workmen directed

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those engaged in lifting the weight to swing the weight around, knowing that the commencement of this operation would increase the strain upon the building. *Held* that, although none of the employes at the foundry were at that moment at work in the building, still, since they were liable to return to work in it, it was negligence upon the part of the superintendent not to warn them of the danger of what he was about to do.

Per Biggs, J., dissenting :

9. Fraud: RESCISSION OF CONTRACT. Where a contract has been obtained by fraud, the defrauded party may rescind it without the aid of any court, if he acts promptly after the discovery of the fraud; but, in such case, he must return, or offer to return, whatever of value he has received on account of such contract. And this rule is applicable to the compromise and release of a disputed claim for less than its amount.

AFFIRMED (*and certified to the supreme court*).

Fisse & Tiffany, for appellant.

A. R. Taylor, for respondent.

THOMPSON, J.—This action is brought by an employe against his employer to recover damages for a personal injury on the theory of negligence. There was a trial before a jury, and a verdict and judgment in favor of the plaintiff in the sum of $1,500. The defendant appeals to this court, and assigns errors in such a way as requires us to set out the pleadings. The petition was as follows:

"The plaintiff states that the defendant is, and at the times hereafter mentioned was, a corporation by virtue of the law of Missouri, and owned and operated the foundry, building and appliances herein described; that prior to and on the thirteenth day of September, 1889, the plaintiff was in the service of the defendant at its foundry at or near the junction of the Missouri Pacific railway and Cabanne avenue, in the city of St. Louis, as a molder; that on said day, whilst the plaintiff was in the due discharge of his duty as such molder in said foundry building, the timbers or stringer of

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said building, a piece of timber about eighteen feet long and nine inches wide, and seven inches thick, fell upon the plaintiff injuring plaintiff's back and spine, breaking his ribs, and also his left arm at the wrist, and also lacerating and wounding plaintiff's head and face. And plaintiff avers that said timber was so caused to fall upon and injure him through the negligence and carelessness of defendant's superintendent in charge of defendant's servants in another department of defendant's business; that defendant had on the outside of said building a certain derrick or crane used for lifting heavy weights; that said crane was sustained by certain rods of iron, which ran from said crane through the walls of said building, so as to hold said crane steady when heavy weights were being lifted; that on said day, whilst said superintendent, defendant's agent in charge of said work, was causing an iron yoke to be raised, owing to the said yoke being of too great weight to be sustained by said crane and its fastenings aforesaid, said rods pulled out a portion of the wall of said building, thereby causing said timber to fall upon and injure the plaintiff as aforesaid. And plaintiff avers that said superintendent and agent of the defendant was negligent in thus undertaking to raise said yoke with said appliance, which was insufficient therefor, and thereby caused said timber to fall upon and injure the plaintiff. And plaintiff further avers that defendant was negligent in furnishing and maintaining said appliance, which was unfit and insufficient for the use to which defendant was applying it, in that it would not sustain said heavy weight, and thereby defendant directly contributed to cause plaintiff's said injury; that, by his injuries, sustained as aforesaid, plaintiff has suffered, and will hereafter suffer, great pain of body and mind; has been permanently crippled and disabled from labor; has incurred, and will hereafter necessarily incur, large expenses for medicines, medical

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attendance and nursing, and was, and is, damaged in the sum of $15,000, for which sum he prays judgment."

The answer of the defendant is as follows:

"Now comes the above-named defendant, by its attorneys, and, for answer to the petition of the said plaintiff filed in this cause, says that it denies each and every allegation contained in said petition.

"Wherefore, having answered herein, said defendant prays for judgment with its costs.

"*Second.* For another and further defense to the said petition, this defendant says that, if plaintiff suffered injuries as alleged in said petition, which defendant denies, such injuries were not due to any neglect or want of care on part of this defendant, but were due altogether to the negligence of the said plaintiff, which said negligence of the plaintiff, defendant says, directly contributed to and brought about said injuries, if the plaintiff in fact suffered any such injuries. And the defendant further says that, if any timber or timbers of its said building fell upon or injured the plaintiff, which it denies, the said plaintiff had full notice of the fact, that such timbers were likely to fall upon and injure him if he remained in proximity thereto, and the defendant says that, notwithstanding such full notice, and notwithstanding ample opportunity to said plaintiff to remove from the neighborhood of any such timbers, the plaintiff nevertheless remained under the same, and thereby voluntarily placed himself in a dangerous situation, knowing at the time that such place was dangerous, and suffered any injuries—if any he did suffer—in consequence of such want of care on his part.

"Wherefore, defendant says the plaintiff ought not to be allowed to have or maintain his said action, and defendant, therefore, prays judgment herein with its costs.

"*Third.* For another and further defense to the said pretended cause of action of said plaintiff set out in his petition, this defendant says that the said plaintiff ought

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not to be permitted to have or maintain this action against it, for the reason that heretofore, and after the date when as alleged in said petition the plaintiff suffered injuries in the manner stated in said petition, the said plaintiff entered into an agreement with this defendant in words and figures as follows, to-wit:

" 'This agreement entered into this fourteenth day of September, eighteen hundred and eighty-nine (September 14, 1889), at St. Louis, Missouri, between A. O. Girard (known on our books as A. O. Raymond, check number 306), of the one part, and the St. Louis Car-Wheel Company, both of St. Louis, Missouri, of the other part, witnesseth:

" 'That whereas said Girard, who was up to September 13, 1889, working as a molder in the employ of the St. Louis Car-Wheel Company, sustained injuries by the accidental falling of timbers, whereby he will be incapacitated for such service as a molder, temporarily, the said car-wheel company, on their part, proposes to furnish and pay for all the medical attendance necessary for his recovery from said injuries sustained by said accident, and to keep his name on its pay roll at the uniform wages per day, for all working days, which he has been up to this time credited, and in any other way in their power assist in his recovery until he is physically sufficiently recovered from said accident, evidenced by physician's certificate, to resume work, and that on his part, beyond the above obligation of the St. Louis Car-Wheel Company, he relinquishes all other claims whatsoever as to them, and that he agrees to this deliberately, and of his own free will, and without any undue influence from anyone. The said parties in evidence of which, and in good faith, sign this the date first herein written.

" 'A. O. GIRARD.

" 'ST. LOUIS CAR WHEEL CO.

" 'September 15, 1889.

" 'By R. W. GREEN, Secretary.

" 'Witness, W. E. WAKEFIELD."

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"Which said agreement, this defendant says, was made, accepted and received by both the plaintiff and this defendant in full satisfaction and discharge of all and every claim, existing in favor of the said plaintiff, against this defendant, on account of the injuries complained of in said petition.

"And the defendant says, that, in pursuance of the said agreement above set forth, it did provide and furnish and pay for the medical services necessary for the recovery of said plaintiff from the injuries alleged to have been sustained by him, on account of said accident, so far as it was permitted to do so by said plaintiff, and did and provided for him all other things requested by him and necessary to promote his said recovery, so long as he remained in the city of St. Louis, and so long as it was permitted so to do.

"But the defendant further says that, about the first day of November, 1889, said plaintiff departed from the city of St. Louis, without communicating to this defendant his intention so to remove, and his whereabouts remained unknown to this defendant for some time; that subsequently thereto, when the plaintiff's residence had become known to this defendant, the defendant again procured a competent physician to visit him, and offered the plaintiff the services of said physician at its own cost, as it was bound to do by the terms of its said agreement above set out with the plaintiff, but the said plaintiff refused to accept the services of said physician.

"The plaintiff further says that, since the date of the alleged injuries to the plaintiff, it has kept his name upon its pay roll, as provided in said agreement, at the uniform wages per day for all working days, which he had been up to the time of said injuries earning and credited, and is ready and willing to pay unto the said plaintiff all sums of money, which under the said agreement it undertook and agreed to pay, and avers its willingness now as ever in all matters and things to

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fully perform and carry out the agreements by it assumed and contained in the writing above set out.

"Wherefore, the defendant says that by the said writing and agreement above mentioned the said plaintiff has relinquished all claims against it, excepting its obligations under said contract, and has in consideration of the said contract discharged and released this defendant from all and every claim or liability to him for damages on account of any injuries sustained by him as alleged in said petition.

"Wherefore, the defendant prays judgment herein with its costs."

To this answer the following reply was made:

"Now comes plaintiff, and, for reply to the answer herein, denies the allegations thereof, except as hereinafter specifically admitted. And for reply to the third alleged defense this plaintiff avers that the alleged agreement set forth as the third defense in said answer was without any consideration and void.

"And plaintiff doth further aver that the said alleged agreement was obtained from this plaintiff by the gross fraud and misrepresentations and imposition by the defendant and its agents, practiced upon the plaintiff at the time of the alleged making thereof.

"That, at the time of the alleged making thereof, this plaintiff was in the deepest distress and mental and bodily pain and anguish, caused by the injuries set forth in his petition; that he was at said time not of contracting mind, and was unable through his bodily and mental condition to understand or comprehend the contents of said agreement, and did never assent to the terms thereof; that defendant by its agents, R. W. Green, and W. E. Wakefield, with the fraudulent purpose and design of cheating and defrauding the plaintiff out of his right of action set forth in his petition, and well knowing that plaintiff was incapable by reason of his mental pain and bodily suffering to understand or comprehend the contents or nature of said alleged

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agreement, by undue influence, taking advantage of plaintiff's said condition, induced plaintiff to sign said agreement without knowing or understanding the contents thereof.

"That, at the time of the alleged making of said agreement, the plaintiff was of weak and enfeebled mind by reason of said injuries, and his will was subjected to that of defendant's said agents, and plaintiff did not have mental will or understanding to oppose the will of defendant's said agents, and defendant's said agents, fraudulently taking advantage of the weak and enfeebled condition of plaintiff's mind and will, for the purpose of cheating him, as aforesaid, did, by reason of plaintiff's said enfeebled condition of mind and body, by subjecting his will to theirs, induce and cause plaintiff to sign said alleged agreement. Wherefore, plaintiff says said alleged agreement is of no effect and void, and he prays judgment as in his petition."

The evidence adduced at the trial tended to show that the defendant was a corporation, employed in manufacturing car wheels, and other castings, in the city of St. Louis, and that the plaintiff was employed as a molder. The defendant's shop consisted of a one-story building, having a front of seventy feet on Cabanne avenue, and with that width running westwardly about four hundred feet. Outside this shop, near to its southeast corner, there was located a large crane, or derrick, consisting of an upright mast and a swinging boom, secured near the lower end of the mast and projecting diagonally therefrom. This crane was secured by guy rods, that ran back, and were fastened to various parts of the shop. One of these guy rods extended in a diagonal direction from the top of the mast to the southeast corner of the building, where it was fastened to the building. Others of them ran straight back directly to the building, and were fastened to the trusses that formed the roof. In addition to the last-mentioned guy rods there were two heavy pieces of

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timber, running in the same direction as the last-mentioned rods, and likewise secured to the trusses that supported the roof and formed part of the frame-work of the building. The trusses extended across the entire width of the building, and were placed some distance apart. Brace timbers, crossing each other diagonally, extended from one truss to another.

The evidence also tended to show that, on the thirteenth day of September, 1889, a heavy yoke casting, intended to be used in the construction of the road-way of a cable railroad at a point where it crosses another cable railroad, had been moved out of the shop with a part of the core taken out, and attached to the crane for the purpose of lifting it out of the way. The weight of this casting, with the sand which remained in it, is variously stated by the witnesses at from four to eleven tons. It was moved out under the orders of the defendant's superintendent, and placed in charge of another employe of the defendant, who was designated as "foreman of laborers." He, with the laborers assisting him, caused it to be attached to the crane and partly lifted for the purpose of swinging it around and getting it out of the way, when suddenly the guy rod, which extended to the corner of the building, pulled loose from its fastenings, tearing loose the corrugated covering of the building, and making a loud noise, which attracted the men working in the foundry to the door to see what was the matter. The evidence also tended to show that the defendant's foreman of laborers, as soon as he saw that the fastenings of the crane to the building had given way, started to let the weight down; but that the defendant's superintendent appearing on the spot, and fearing that the jar of letting it down would disturb the fastenings more, ordered him to desist. There was then an interval, variously stated by the witnesses at from fifteen to thirty minutes, during which the crane with its weight and the building remained *in statu quo*. It should be remarked that the

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plaintiff's testimony tends to show that he did not quit his work during this interval, but continued to work right on, unmoved by the noise, the danger and the excitement. At the expiration of this interval, defendant's superintendent determined to swing the yoke around, still attached as it was to the crane, although one of the guy rods attaching the crane to the building had thus been pulled out, and although, as the defendant's testimony tends to show, the building was cracking continually from the stress made upon it by the weight suspended to the crane. Notwithstanding the evident danger, under the circumstances detailed, attending this operation, he did not give any warning to the men at work within the building that he was about to attempt it. The reason, which he gives for not warning the workmen inside the building, was that he looked inside, and saw no workmen at work within thirty feet of the wall which was the place of danger, and consequently concluded that it was not necessary to give any warning. If he had given such warning. it is scarcely to be doubted that the plaintiff would not have been hurt; for, according to the plaintiff's testimony, he was at work at or near what proved to be the place of danger, while, according to all the evidence, if the superintendent's statement was true. he must have returned to that place, which it is reasonable to suppose he would not have done, if he had been warned of the danger.

The attempt thus made by the superintendent to swing the weight around had the effect of subjecting the building to such further strain as detached a beam from the roof of it, above the place where the plaintiff was working, which fell on him, breaking both bones of his left forearm near the hand, causing a severe contusion on the side or back near the tenth rib, causing several contusions, unimportant in character, on his head, and injuring him severely.

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We may stop at this point, and, with this view of the pleadings and the evidence, dispose of two assignments of error which are too plainly untenable to require extended discussion. The first is that there was no evidence of negligence to take the case to the jury under the petition; in other words, that the negligence, which the plaintiff's evidence tended to prove, was not the negligence charged in the petition. The negligence charged is attempting to raise a weight with an appliance which was insufficient therefor, and furnishing for such purposes an insufficient appliance. The evidence fits this allegation of negligence, and, if it goes further, shows *other negligence*, that is no ground for taking the case from the jury. It does go further, and shows other negligence in attempting an operation dangerous to the workmen inside, without giving them any warning. In so far as there was in this respect a variance between the evidence and the petition, if the defendant desired to take advantage of that, he should have objected at the trial, and then plaintiff could have amended his petition. The other assignment of error, which we shall now dispose of, is that the plaintiff's own negligence contributed to the injury which he suffered. This negligence, it will be perceived from what has been stated, consisted in his continuing at his work according to his contract of employment, in his customary place, in the absence of any warning or direction not to do so, and notwithstanding the fact that some injury or other had evidently happened to the building from what they were doing outside, under the reasonable assumption that they would not pull the building down over his head. No unavoidable inference of contributory negligence arises from this conduct.

The next assignment of error relates to the release set up by the defendant in his answer; and we shall first dispose of the question, in so far as it is a question of pleading. The first objection of the defendant, in respect of this release, is that it so far stands in the way

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of the plaintiff's recovery that he cannot bring a direct action upon the cause of action thus released, without first bringing a suit in equity to set aside and cancel the release on the ground on which he now seeks to avoid it in his reply. But counsel for the defendant concede that this suit in equity need not be a separate action, but that it can take the form of one of the counts in the petition in an action for damages, according to the precedent in *Blair v. Railroad*, 89 Mo. 334. In other words, counsel for the defendant concede that the plaintiff could sue in equity in one count to set aside this release on the ground of fraud and undue influence, and in another count for damages at law for the injury for which he now sues; but they argue that he cannot undertake to avoid the release by setting up in his reply that it was obtained by fraud or undue influence, as he seeks to do in this case.

The proposition that a party, who has been induced by fraud or undue influence to release a right of action, cannot sue directly at law upon the right of action thus released, but must first proceed in equity to avoid and cancel the release, is not, and never has been, the law. It is true that in *Blair v. Railroad*, 89 Mo. 383, there is this observation in the opinion of the court. "The release being valid, it was necessary that its bar be removed by appropriate procedure in order to the successful prosecution of the action at law." As the plaintiff in that case took the course indicated by the remark of the court, it was not necessary for the court to decide that it was necessary for her to do so. The remark is, therefore, a mere *dictum*. That it does not correctly express the law is shown by the statement of Mr. Chitty in his work on pleadings, where he says that, "to a plea of release, he (the plaintiff) may reply *non est factum*, or that it was obtained by duress or fraud, and it is unnecessary and injudicious to state the particulars of the fraud." 1 Chitty on Pleading [16 Am. Ed.] p. 608. While the last

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clause of this authoritative writer, that it is not necessary or judicious for the plaintiff in his reply to state the particulars of the fraud, was the rule of pleading at common law, yet it does not remain the rule of pleading under our code of procedure. In another place the same author gives the form of a reply of fraud, where the defendant had pleaded a release. 2 Chitty, 455. This rule of pleading was recognized in the opinions of the judges in *Wild v. Williams*, 6 Mees. & W. 490, where they refuse to strike out a plea *puis darrein continuance*, setting up a release, on affidavits showing that the release was obtained by fraud, holding that the plaintiff could contest the plea on that ground under a replication setting up the fraud. That the plaintiff may, in an action at law, reply fraud to a plea or answer setting up a release of the cause of action, was held by the supreme court of New Hampshire in *Webb v. Steele*, 13 N. H. 230, and in *Hoitt v. Holcomb*, 23 N. H. 535, and by the supreme court of Illinois in *Chicago, etc., Ry. Co. v. Lewis*, 109 Ill. 120, in both of which states the common-law system of pleading is understood to prevail. The same rule has been declared in Wisconsin (*Bussian v. Railroad*, 56 Wis. 325, 335), and inferentially in New York (*Dixon v. Railroad*, 100 N. Y. 170), in both of which states there is a system of code procedure similar to that which obtains with us. This court evidently took the same view of the question in *Vautrain v. Railroad*, 8 Mo. App. 538, though the opinion is not very distinct on the point; and it is to be added that that case was affirmed by the supreme court on appeal (78 Mo. 44), although without noticing the particular point. We, therefore, overrule this assignment of error. See, also, *O'Donnell v. Clinton*, 145 Mass. 461; *Peterson v. Railroad*, 38 Minn. 511; *Lusted v. Railroad*, 71 Wis. 391; *Ryan v. Gross*, 12 Atl. Rep. (Md.) 115.

The next assignment of error is, that there was not sufficient evidence of fraud or undue influence,

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wrongfully exercised against the plaintiff, to warrant the court in submitting this issue to the jury. The defendant pleaded the release *in hæc verba*, and its execution was admitted by the plaintiff. This made a *prima facie* case for the defendant. To avoid this the plaintiff set up want of consideration and fraud. As the defendant's promise was in itself a sufficient consideration for the release, there was nothing which could be submitted to the jury on the question of consideration, except its adequacy, which still remained an element in determining the question of fraud and undue influence.

It is difficult to formulate a precise rule applicable to this class of cases. Releases of this class stand upon the footing of compromises, and should be upheld when fairly made. What evidence will suffice to set them aside is a question on which the courts have made very few attempts at definition. One court goes to the extent that, unless the evidence is clear and convincing and such as would warrant their being set aside in equity upon the *whole evidence*, they cannot be disturbed. *Railroad v. Shay*, 82 Pa. St. 198.

Considering the fact that the question is triable by jury, and that, under our mode of procedure, the credibility of the witnesses is always for the jury in the first instance, this view is not tenable, and does not meet with our approval. The just rule under our practice seems to be this: No release should be vacated, unless the plaintiff's evidence, if believed, and the circumstances attending its execution are such as would warrant a chancellor in setting it aside.

Stating the evidence with a view to the application of this rule, we find that it tends to prove that the injury which the plaintiff received was so severe as to render him unconscious for a time; that, as soon as an ambulance could be procured, he was removed to the city hospital, where his wounds were dressed; that on the following morning he was, at his own request, removed from the city hospital to his room in the city,

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in a carriage which the defendant sent for that purpose; that on arriving at his room he did not go to bed, but placed himself in a chair and remained sitting up. At this point there is a missing link in the plaintiff's testimony, which must be supplied by the testimony adduced by the defendant. This link relates to the circumstances under which the release pleaded by the defendant was signed. That it was signed by the plaintiff is admitted by pleadings; but the plaintiff in his testimony professes to have no recollection whatever of signing it, or of being visited by the secretary and superintendent of the defendant on the occasion at which it was signed. According to the testimony adduced by the defendant he was, after being thus removed to his room, visited in his room first by the defendant's secretary. This was about one o'clock on the day after he was hurt. At this interview the plaintiff assented to an arrangement, such as that embodied in the release which the defendant has pleaded.

What took place at this first interview may be gathered from the testimony of Mr. Green, the defendant's secretary, which was to the effect that, on the morning after the accident, he had the plaintiff removed from the hospital to his own room, and that a little after one o'clock he went round to see him, and have a talk with him. He told the plaintiff that he had to go away to-morrow night to St. Paul, and that he would like to arrange this matter. He then made to the plaintiff the proposition for the settlement embodied in this agreement, and the plaintiff replied: "That seems fair enough. *Q.* What else? *A.* Well, that was about all, except that he asked me to send Frank Rosenberger up there."

The second interview took place about three o'clock in the afternoon of the same day, and Green then brought Wakefield, the superintendent, along with him to be a witness to the transaction. The plaintiff at this

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second interview was again alone. At this time Rosenberger had not called upon the plaintiff. Mr. Green admits in his testimony that he thought that it was the proper thing to have the thing put through as quickly as possible—he thought that was for the plaintiff's interest, and for the company's. He claims to have been looking after the plaintiff's interest as well as that of the company. He took along Mr. Wakefield to witness the paper. He carried along a fountain pen with ink in it.

"*Q.* You had an idea you were going over there to get this fellow to release you from this trouble—isn't that it? *A.* Well, yes, to a certain degree. * * *

"*Q.* Why were you in such a hurry to get at him the next morning? *A.* Well, I don't know of any other reason *than that some attorney in our absence would get hold of him*, and persuade him to sue us and cause us trouble. * * *

"*Q.* Now, did you and Green confer about how you would work this thing? Did Green talk with you about how you would work it—get up this release and go over there before anybody talked with him, and get him to sign the release? *A.* Well, I do not recollect now. Well, I believe there was a remark that, *if people got to talking with him, that would change his mind.*"

The evidence delivered by the defendant's secretary also showed that he shortened the interview with the plaintiff as much as possible, because he had occasion to leave the city that evening on business, and because he regarded it as "business" so to shorten the interview. Evidence adduced by the plaintiff also showed that the plaintiff was in need of money at the time. According to the testimony of these two witnesses they found the plaintiff seated in a chair in his room apparently in an undisturbed mental condition. The secretary presented the paper to him to sign, and explained it to him; he examined it and signed it.

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Plaintiff's testimony tends to show, when taken in connection with the testimony thus adduced by defendant, that he was in such a mental state when the release was signed that he could neither remember the visits of the persons who induced him to sign him, nor the fact of his having signed it; but he testifies that he found the paper lying on his floor some days afterwards. In addition to this testimony as to his mental condition, he called two witnesses. One of them, a fellow workman, testifies that he was sent by the defendant to visit the plaintiff on the day after he was hurt, at the plaintiff's room, and that while in the conversation which he had with the plaintiff the latter used proper language, and seemed to know and understand what he was talking about, yet he seemed to be bewildered—"his mind was not clear." Another witness, also a fellow workman, testifies that he visited the plaintiff at his room on the day following that on which the release was signed—that is, on Sunday, September 15, and that he found the plaintiff acting not rational; that is, his conduct was unusual, in that he seemed more good-humored and jovial than was customary for him. He did not seem to the witness to act or talk as he did before the accident. His manner was changed; his mind did not seem to be clear; he seemed a little mixed up.

On the other hand, the evidence of the defendant tended very clearly to show that the plaintiff was in good mental condition when he signed the release. This may be especially predicated of the evidence of the physician, whom the defendant employed to attend to the plaintiff.

In addition to these circumstances, the instrument itself contained this unusual clause: "He agrees to this deliberately, of his own free will, and without any undue influence from anyone." Unusual clauses of this kind in instruments, by which the draftsman of the instrument has obtained an advantage over the other

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party to it, always excites suspicion of a fraudulent motive. It is said by Mr. Bump: "Anything out of the usual course of business is a sign of fraud. Unusual clauses in an instrument excite suspicion. *Clausulæ inconsuetæ semper inducunt suspicionem.*" Bump on Fraudulent Conveyances, p. 51. Quoting this maxim, it is said by our supreme court: "Whenever fraud is the matter in issue, any unusual clause in an instrument, any unusual method of transacting the business, apparently done with the view for effect, and to give to the transaction an air of honesty, is of itself a badge of fraud. For, 'when the part is overacted the delusion is broken, and the fiction appears.' *Comstalk v. Rayford*, 12 Smedes & Marsh, 369. This has been the rule ever since *Twyne's Case*, 3 Coke, 81, where it was held a circumstance of grave suspicion that a clause in the conveyance recited that the gift was made honestly, truly and *bona fide*." *Baldwin v. Whitcomb*, 71 Mo. 651. The agents of the defendant, who procured the plaintiff to sign this instrument, entirely failed to explain why this clause was put in it, and the jury were, therefore, authorized to conclude that it was done with the motive of providing against the anticipated contest of the validity of the transaction.

We have here the image of a man, who has been badly hurt while in the service of a corporation, under circumstances which suggest that he has probable cause for an action for damages against them. He is hurt in three places, in the arm, in the back and in the head. He has had no surgical assistance, except such as the managers of the corporation have provided for him. He has not been informed of the probable extent of his injuries, and they presumptively know them, as far as a competent surgeon can make a prognosis. After being hurt he has been taken by them to the public hospital where his wounds have been dressed, after which he has been removed very kindly by them to his own room at his own request. Here, without any delay, beyond what

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seems necessary to plan the transaction, and on the day immediately following the accident, he is visited by the secretary of the corporation, and the settlement under consideration is proposed to him. He assents to it, but, at the same time, requests that they send Frank Rosenberger to him. The evidence shows that the men engaged in the kind of work done by the plaintiff in the defendant's establishment worked in pairs, and that Rosenberger was the fellow workman with whom the plaintiff was paired in his work; and the jury might fairly infer that he desired to consult his work-mate, Rosenberger, about so important a matter. But the managers of the corporation take care to hurry up the consummation of the settlement before the plaintiff has an opportunity to consult Rosenberger or anyone else; in point of fact, Rosenberger, though called in pursuance of the request which the plaintiff thus makes, does not arrive until after the agreement is signed. They hurry it forward with the admitted purpose of bringing it to a conclusion before the plaintiff could have an opportunity of taking legal advice as to the nature and extent of his rights. Soon after the interview at which he assents to the arrangement, and before he had had an opportunity to consult with anyone, the formal paper prepared by the officer of the defendant is brought to the plaintiff for his signature, by two officers of the defendant, one of them coming along as a witness to the transaction. They find the plaintiff alone in his room, bolstered up in a chair, and suffering from his wounds. No doctor, except their own, has advised him as to the extent of his injuries. Their diligence has been such that he has not had an opportunity to consult a lawyer, nor even his work-mate, Rosenberger, about the transaction. But they are still in danger. Some unlucky intruder may happen into the room before the paper is signed. The defendant's secretary, who is its manager in the matter, shortens the interview by telling the plaintiff that he is obliged to leave the city on business, and

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that he wishes the transaction closed before he goes. Under these circumstances, the plaintiff, alone, unadvised, suffering from his wounds, in need of money, and no doubt disturbed as to his future, and, according to the evidence adduced on his part, which the jury was entitled to believe, whatever we may think of its credit, in a disturbed mental condition, so much so that he does not remember the transaction—is induced to sign this paper, containing the unusual avowal before recited, by which, as it turns out, he relinquishes a very important right of action for a comparatively inconsiderable consideration.

These circumstances suggest the propriety of a judicial inquiry as to the fairness of the transaction. In the eye of justice, there is nothing sacred in a writing when procured by unfair means. We cannot adopt the view of the defendant that the foregoing facts afford no evidence to take the question of the fairness of this transaction to the jury. While such transactions will be upheld and enforced when fairly made (*Chicago, etc., Ry. Co. v. Lewis*, 109 Ill. 120), yet here the very circumstances tend to raise suspicions of the fairness of the transaction. Whether or not we should, if dealing with the whole evidence as chancellors, have taken a different view of it from that taken by the jury, we cannot hold that there was not sufficient evidence in support of the proposition of fraud and undue influence to take the question to them. Undoubtedly, to authorize a jury to set aside a written instrument on the issue of fraud, there must be substantial evidence which, if believed by the jury, tends to the conclusion of fraud. The legal presumption which springs from the execution of the writing is to be overcome; and it may be regarded as a sound rule, that the question of the validity of a release, as having been procured by fraud, ought not to be submitted to a jury where the evidence, giving to it its fullest effect in favor of the party sustaining the burden

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of proof, is such that the instrument would not be vacated by a chancellor.

An examination of a number of analogous cases, where written settlements have been set aside, either by chancellors or by juries, with the approbation of appellate courts, has tended to confirm us in this conclusion.

In *Evans v. Llewellin*, 1 Cox. Ch. 333, a deed was set aside as having been improvidently obtained for an inadequate consideration from persons in low circumstances, and unapprised of their right until the time of the transaction, though no misrepresentation or actual fraud whatever appeared to have been made use of. The master of the rolls said: "I am of opinion this agreement ought not to stand. I lay great stress upon the situation of the parties to it, and the persons who compose the drama. The plaintiff was in mean circumstances, and totally ignorant of his rights until the moment of the transaction taking place. He was then at once told of his title to this estate, and at the same time came an offer of a large sum of money if he would relinquish it. The parties present were Mr. Llewellin, his friend, whom he brought to countenance the transaction, and Mr. Maddock, his solicitor. I must lay very great stress on Mr. Maddock's evidence; for he told the plaintiff what was enough to influence any but a very firm man, that as he understood the defendant's great kindness to the family of the plaintiff, and as the sister's intention to give the estate to the defendant was clear, the plaintiff ought not in equity and conscience to take advantage of the blunder. I do not say that the consummation of an act, not in itself valid, will not in any case hold without an adequate consideration; there certainly may be cases put in which such confirmation would be effectual, if proper time were allowed to the party and due caution used in making him aware of the consequences; but here is a man destitute of money, and two hundred guineas are suddenly offered to him,

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which, to a man in his circumstances, is a very important sum, and he is then called upon to convey an estate in prejudice of himself and his family for the benefit of a person in affluent circumstances. It is said he was cautioned by Mr. Maddock; it is true, and so far the parties did right; but they ought to have gone further; they should not have permitted the man to have made the bargain without going to consult his friends; there was not sufficient *locus penitentiæ;* there was no person present to give him advice; he was entirely in their hands, and surprised at this unexpected acquisition of fortune."

Another case of a release obtained where the parties were in grossly unequal circumstances is found in *Mitchell v. Pratt*, Taney, 448, where a sailor, who was at the same time paid off, signed a release of damages for a grievous and unjustifiable assault and battery, in consideration of the sum of twenty-five cents. Mr. Chief Justice TANEY did not doubt that, "if this settlement was fairly made, when the seaman was free from improper influences, and had an opportunity of exercising his free and deliberate judgment, it ought to be supported; but, in order to entitle it to support, it must, in the language of the court in the case of *Cumber v. Wane*, 1 Strange, 426, 'appear to be a reasonable satisfaction, or at least the contrary must not appear.' And in this view of the matter, it is of no importance whether this paper be regarded as a release, or merely as a receipt; for it certainly cannot be supported in either case, if it appears to have been obtained unfairly, or by improper influence." And the court, considering the inadequacy of consideration, the graveness of the injury, and the further fact that, although it was intended to discharge the sailor there, the master had the power to compel him, under the articles, to proceed to another port before discharging him and paying him off, was of opinion that the release was not fairly procured, and that it ought not to stand.

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In the case of *Peterson v. Chicago, etc., Ry. Co.*, 38 Minn. 511, a woman brought an action against a railroad company for damages for a personal injury. They pleaded a release, and she replied fraud in obtaining it. She recovered a verdict for $3,000, and on appeal the company assigned for error that the verdict was not justified by the evidence especially as to fraud in procuring the release. The court overruled this assignment in view of evidence to the effect that the defendant's agent had told the plaintiff, when he induced her to sign the release, that her physician had said that her injuries would soon be cured with proper treatment; and this although it appeared from the plaintiff's own testimony that she did not rely exclusively upon this statement in making the release, and although some detached portions of the plaintiff's testimony made it appear that she had ascertained its falsity before accepting the money. "But," said the court, "taking the whole of it together, we think it fairly and reasonably susceptible of the construction that, although her own opinion had been that she would never fully recover from her injuries, and that, notwithstanding the alleged opinion of her physician, she still had doubts about it, yet, in view of his supposed superior knowledge of her case, she so far relied upon his opinion, and was so far influenced by it, that it was the inducing cause of her signing the release."

In a case in the supreme court of Michigan, a settlement made for injuries made when the plaintiff was sick and in need of money for her family, and upon the statement made to her by the defendant's agent that to appear in court would be a disgrace, which settlement was repudiated by her the next day, and the money returned, was held no bar for a recovery for such injuries. *Stone v. Railroad*, 66 Mich. 76; s. c., 30 Am. & Eng. R. R. Cases, 600; 33 N. W. Rep. 24.

In *Bussian v. Railroad*, 56 Wis. 325, 334, the court held that a jury were justified, and that a chancellor

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would have been justified also in setting aside a release of damages obtained from a woman by an agent of the defendant, after her action against the defendant had been commenced, and without consulting her attorney. The court, without imputing any intentional wrong to the defendant or its agent, said: "We think that no release, obtained from the plaintiff after an action has been commenced and counsel employed, in the absence of the plaintiff's counsel, and without his consent or knowledge, should bind the party unless the utmost good faith is shown on the part of the defendant in obtaining the same. When a party has employed an attorney to procure an action, such attorney ought to be consulted if a compromise of such action be sought, and ordinarily it would be bad faith on the part of the client and the opposite party to compromise the action without the consent of, or without consulting, such attorney." In the case last cited the court cited and quoted from its previous decision in *Watkins v. Brant*, 46 Wis. 419, as laying down a doctrine quite appropriate to the case under consideration. In that case a settlement was made between two sisters in regard to their rights to certain real estate. The settlement was made in the presence of the attorney of the elder sister, the attorney of the younger not being present. The court condemned the transaction in strong language, and set the settlement aside. "No transaction" said the court "should ever be consummated, as it were *ex parte*, in a lawyer's office."

In *Lusted v. Railroad*, 71 Wis. 391, the plaintiff, while sick in bed, and suffering from such injuries as to affect his sight and render him dizzy, signed a sealed release of his claims against the defendant for loss or damage and personal injuries caused by a railroad collision. It was held that a jury were warranted in finding that the release was procured through a mistake, and was not binding upon him, since the circumstances of its execution did not disclose such

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negligence in not knowing its contents as to preclude him from showing that, in fact, he did not have such knowledge,—and this, although no actual fraud was perpetrated upon him. The court laid stress upon the fact that the jury found in answer to special questions that the release of damages for the personal injuries was not talked about at the time when the release was signed. In fact, the supreme court of Wisconsin hold that one, who signs an alleged discharge or acquittance without knowing its contents, is not bound by it. *Butler v. Regents*, 32 Wis. 124; *Schultz v. Railroad*, 44 Wis. 638, 645. To the same effect is *Chicago, etc., Ry. Co. v. Lewis*, 109 Ill. 120, 130; *Illinois, etc., Ry. Co. v. Welch*, 52 Ill. 182.

In *Blair v. Railroad*, 89 Mo. 383, the action was by a married woman against a railroad company for personal injuries received in a railway accident, and there was a count in the petition in the nature of a bill in equity in which she sought to set aside a written instrument in which she had released her right of action in consideration of the payment of $30, averring that it had been procured from her through fraud, in ignorance of the extent of her injuries and of her legal rights in the premises. The evidence upon this issue is not stated, but the following observations of Mr. Justice SHERWOOD, have some pertinency to the case before us: "There can be no doubt that there was evidence justifying the conclusion which the circuit court reached, that mistake and misapprehension existed on the part of Mrs. Blair when she signed the release; she evidently did not think that she was seriously injured, nor did defendant's agents, or, if they did, their conduct smacks of fraud in inducing her to sign a paper relinquishing rights not in contemplation of the parties at the time. It is most evident that the only compensation she received was for her loss of time, a paltry sum, and yet the release recites and embraces full satisfaction for all damages for personal injuries, loss of time, and expense

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resulting from the accident. The doctrine is firmly rooted in equity that when an instrument is so general in its terms as to release the rights of a party of which he was ignorant, and which were not in contemplation of the bargain at the time it was made, the instrument will be restrained to the purposes of the bargain, and the release confined to the right intended to be released."

Error is next assigned upon the giving of the following instruction at the request of the plaintiff: "1. The court instructs the jury that, if the plaintiff signed the paper release read in evidence at the instance of the defendant's agents, and without knowing its contents, and that he did never assent to the terms of release, then said release is no defense to this action."

The objection urged against this instruction is, that it omits the element that the plaintiff received and retained benefits under the contract of release, which is an undisputed fact under the testimony. These benefits, we understand, consisted of the attendance of a physician procured by the defendant for a month subsequent to the accident, for which the defendant paid the physician $50; and also the payment to the plaintiff of his wages for the portion of the month of September that elapsed subsequently to the date of the accident. The jury, in their verdict, gave the defendant a credit of $62 for these benefits.

It is not the law that a party who has been induced by the fraud of the other party, to release his right of action against the latter, must restore the consideration which he has received for the giving of the release, in order to be entitled to set up the fraud in avoidance of the release in an action upon the cause of action thus released. *Chicago, etc., Ry. Co v. Lewis*, 109 Ill. 120. It is true, as a general proposition of law, that one, who is induced by fraud to enter into a contract with another, must, within a reasonable time after discovering the fraud, notify the other party of its rescission and restore to him whatever consideration he

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has received under it. But he is not bound to restore to the other party what he has received under it, where the other party is indebted to him in a larger amount.

It is also a general principle of law that where a party, who has been induced by the fraud of another to enter into a contract with that other, discovers the fraud, but, nevertheless, after discovering the fraud, accepts benefits from the other party under the contract, he thereby affirms the contract and precludes himself from disaffirming it. There was probably evidence which would have authorized the court to submit that question to the jury; but the failure of the court to embody that hypothesis in this instruction was at best mere non-direction which could have been supplied on the application of the defendant by requesting the proper instruction.

This instruction is, however, faulty in a particular in which it has not been challenged by the defendant. It is not the law that the mere failure of a party to a contract, who labors under no disability or infirmity, through his own fault or neglect to read or inform himself of it as to its contents, is sufficient to annul or overcome its legal effect as to him. *Gwin v. Waggoner*, 98 Mo. 315. But the jury could only understand the instruction in the light of the pleadings and the evidence; and other instructions fully explained to them that the failure of the plaintiff to understand the contents of the instrument, which would avoid it, must have proceeded from his mental infirmity at the time.

It is next assigned for error that the court gave the following instruction at the request of the plaintiff: "2. If the jury find from the evidence in this case that the paper release read in evidence was signed by the plaintiff when he was in a mental condition such that he could not comprehend or understand its contents; and if the jury further believe from the evidence that defendant's agents, Green and Wakefield, took advantage of plaintiff's said condition to induce him to sign

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said paper, and that said agents, owing to plaintiff's said mental condition, induced plaintiff to sign said paper without understanding its contents, intending thereby to defraud the plaintiff out of his cause of action set forth in the petition, then said paper release is no defense to this action."

The objection which is urged to this instruction is, that it omits the element of knowledge, on the part of the defendant, that the plaintiff was of infirm mind at the time when the negotiations for this release were had. It is argued that the plaintiff in his reply does not seek to avoid the release upon the mere ground, that he was of unsound mind at the time when he executed it, but that his reply sets up the ground of avoidance of the release that the defendant had defrauded and cheated him into signing it, by knowingly taking advantage of his enfeebled condition. This is not a correct statement of the reply. It proceeds on both grounds. It avers "that he was at said time not of contracting mind, and was unable, through his bodily and mental condition, to understand or comprehend the contents of said agreement, and did never assent to the terms thereof." So far as omitting the element of knowledge on the part of the defendant is concerned, this instruction is not open to that objection; for it charges substantially in the language of the reply that the defendant's agent "*took advantage* of the plaintiff's said condition to induce him to sign said paper." This language implies the *scienter* which is necessary to constitute fraud in fact. We, therefore, overrule this assignment of error.

Error is next assigned upon the giving of the following instruction at the request of the plaintiff: "5. If the jury find from the evidence that plaintiff was in the service of the defendant on the thirteenth day of September, 1889, as a molder; and if the jury further find from the evidence, that on said day, while plaintiff was in the discharge of the duty of his said employment at

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defendant's shop, a piece of timber, being a part of said shop, fell upon and injured the plaintiff; and if the jury further believe from the evidence, that said piece of timber was caused to so fall upon and injure the plaintiff by reason of a strain or displacement of said shop, caused by the lifting of the heavy iron yoke mentioned in the evidence; and if the jury further find from the evidence that one Wakefield was superintendent for defendant, and by it authorized to control said work, and the laborers doing same, as to the manner of doing said work, and if the jury further find from the evidence that said Wakefield did not use ordinary care in causing said yoke to be lifted by the crane, supported as it was at the time in the manner it was lifted, owing to its weight, and that thereby said timber was caused to fall upon and injure the plaintiff; and if the jury further find from the evidence that plaintiff, at the time of and just preceding his injury, was exercising ordinary care, then plaintiff is entitled to recover, provided the jury further find, under the evidence and instructions, that the plaintiff did not agree to the paper release read in evidence as defined in the other instructions."

We find ourselves unable to comprehend the objection which is made to this instruction. That objection, as stated at the outset of defendant's argument, is that the instruction "allows a conclusion of negligence to be inferred from the single fact that the timber fell because of an undue strain on the supports of the crane." It does not seem to us to be subject to this criticism. It predicates the plaintiff's right of recovery, not on the mere fact that the timber fell because of an undue strain on the supports of the crane, but on the hypothesis that Wakefield, the defendant's superintendent, did not use ordinary care in causing the yoke to be lifted by the crane, supported as it was at the time, in the manner it was lifted owing to its weight, and that thereby the timber was caused to fall upon and injure the plaintiff.

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There was in the plaintiff's evidence abundant material for this hypothesis.

Another objection to this instruction, that it predicates the plaintiff's right of recovery upon the acts of the defendant's superintendent Wakefield, in endeavoring to *raise* the yoke with the crane, whereas, in point of fact, the catastrophe was produced by his endeavoring to *let it down*, is too refined for the practical purposes of justice. The defendant's foreman of laborers commenced to raise the yoke in obedience to the orders of the superintendent Wakefield, and, when he had got it partly raised, the guy attaching the crane to the corner of the building broke loose from its fastenings. Then the foreman of laborers started to lower the yoke, but the superintendent, fearing that that would cause greater strain to the building, ordered him to desist, and to chock it, which he did. Then, after the lapse of the interval already stated, the superintendent determined to try to swing it around, with the intention of getting it down; and while they were thus bringing it around the catastrophe which hurt the plaintiff happened. It would be a great refinement to hold this instruction erroneous, in the sense of being prejudicial, on the mere ground that it predicates the negligence of the defendant upon a want of ordinary care in attempting to raise the weight, when in fact the negligence, if any, consisted in the want of ordinary care in attempting to get it down after it had been partly raised, and could not safely be raised any further. The accident took place in consequence of what was done or omitted in the general attempt to raise the weight with what proved to be an unsafe and insufficient appliance; and this statement is sufficient to show that there was no prejudicial error in the instruction.

The next assignments of error are predicated upon the refusing of certain instructions tendered by the defendant. Concerning these assignments of error we have to observe that there were but three issues in the case: *First.* The negligence of the defendant.

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Second. The contributory negligence of the plaintiff. *Third.* The validity of the release. The defendant, nevertheless, tendered *seventeen* instructions, of which the court gave *twelve.* As we have often observed, following the views of the supreme court, the court might properly have refused them all, by reason of their number alone. Such a number of instructions is well calculated to confuse and embarrass, rather than enlighten and assist, an ordinary jury.

We shall nevertheless examine those which were refused. One of these instructions was as follows: "13. The court instructs the jury that, if you find and believe from the evidence that defendant's officers, superintendent and foreman failed to notify and warn plaintiff of the apprehended danger from the falling of the crane, whereby plaintiff was injured, that is not an act of neglect on part of the defendant for which you can hold it liable in this case."

The instruction in this form was refused, but the court modified it by adding thereto the following words: "Unless you further find that the foreman of defendant was negligent in attempting to raise so heavy a weight as said iron yoke with said crane, fastened and secured as it was, as defined in other instructions."

So that the said instruction as modified by the court and given to the jury was as follows: "The court instructs the jury that, if you find and believe from the evidence that defendant's officers, superintendent and foreman failed to notify and warn plaintiff of the apprehended danger from the falling of the crane, whereby plaintiff was injured, this is not an act of neglect on the part of defendant for which you can hold it liable in this case, unless you further find that the foreman of defendant was negligent in attempting to raise so heavy a weight as said iron yoke with said crane fastened and secured as it was, as defined in other instructions."

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The instruction might well have been refused entirely, because it was erroneous in point of law and as applied to the evidence in the case. On the defendant's evidence alone, the giving of this instruction would have been gross error. That evidence showed that, after the first catastrophe, the building continued to crack and that defendant's superintendent was apprehensive that it might fall at any time. Nevertheless, in this state of things, he determined, instead of putting supports under the weight and getting it down that way, as ordinary prudence would suggest, to undertake to swing it around so as to lessen the strain on the building, knowing that the commencement of this motion would probably increase the strain on the building. He looked inside and saw no workmen within thirty feet of the wall, and, therefore, concluded that it was not necessary to warn them that he was about to do this, forgetting that they might at any moment, not apprehensive of danger, return to their work in the place of danger. To charge that, under these circumstances, it was not an act of neglect on the part of the defendant to fail to warn the plaintiff of the danger would have been a gross error.

But it is argued that there was no obligation to give such a warning to the plaintiff, because he knew all about it. The answer is that this instruction does not relate to the contributory negligence of the plaintiff, but relates to the negligence of the defendant. The plaintiff knew that something had happened to the building. The building was a "shell," made of framework covered with corrugated iron. One of the rods connecting the crane and the building had pulled loose, making considerable noise and scattering dust. The plaintiff probably knew that, though, according to his own testimony, he continued at his work. He did not have a knowledge of the danger in the sense in which the defendant's superintendent had such a knowledge. Especially he did not know that the superintendent

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was going to do anything which would increase the danger, or which would probably pull the building down over his head. He was a molder, and presumably not a mechanical engineer, and there is no presumption of law that he understood that he was in a place of special danger; and the law will not impute blame to him for continuing at his work, according to his duty to his employer, under the natural supposition that his employer would not pull the building down over his head. The giving of this instruction, as thus modified, was a ruling favorable to the defendant. It had the effect of telling the jury that it was not negligence not to warn the plaintiff, provided that it was not negligence for the defendant's foreman to do what he was about to do.

Error is next assigned on the refusal of the following instruction: "16. Before the jury can find a verdict for the plaintiff, they must be satisfied from the evidence of all of the following facts:

"*First.* That the injury to the plaintiff was caused by the fall of a timber loosened and caused to fall by defendant's action in undertaking to raise with a certain crane on its premises a greater weight than said crane with its fastenings was capable of carrying.

"*Second.* That the injury complained of was the direct and immediate result of defendant's act in undertaking to raise with said crane a greater weight than what it and its fastenings would bear.

"*Third.* That defendant, or its superintendent or foreman, knew that said crane and its fastenings would not bear the weight they were undertaking to lift with it, or might, by the exercise of ordinary care and diligence, have ascertained such fact.

"*Fourth.* That plaintiff, after the fastenings or guy rod spoken of in the evidence had given way, used proper care and diligence to avoid the injury which he sustained.

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"*Fifth.* That the plaintiff could not, by the exercise of such care, as is above indicated, have avoided the injury which he suffered.

"If the jury find against the plaintiff upon any one of the foregoing propositions, their verdict must be for the defendant."

In addition to what we have already said about the number of instructions tendered by the defendant, we observe that we do not see but that all the hypotheses contained in this instruction were adequately covered by the instructions which the court gave at the request of the plaintiff and the defendant, seventeen in all. Indeed, the jury seem to have been too much instructed in this case.

Error is also assigned upon the refusal of the following instruction "17. If the jury believe from the evidence that the plaintiff signed the paper, termed a release, given in evidence, and that the defendant thereby undertook to furnish and pay for all the medical attendance necessary for plaintiff's recovery from the injury sustained by him; that defendant, in accordance with its said undertaking, did procure Dr. Dalton, to attend and treat the plaintiff for his said injury; and that plaintiff accepted the services of Dr. Dalton, and remained under his treatment about four or five weeks, and that defendant has paid said physician, then they will find for the defendant."

We see no error in refusing this instruction. We have already indicated our view as to the proper element of an instruction upon this hypothesis. This instruction is bad, because it leaves out the hypothesis, that the plaintiff accepted the services of Dr. Dalton *with knowledge* that he had been employed by the defendant to treat him in pursuance of the contract of release. Plaintiff's evidence is consistent with the conclusion that, as soon as he discovered the nature of the contract which he had signed, which discovery was on the fifteenth of October, he repudiated it, and

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discharged Dr. Dalton as his physician. According to his testimony, he collected pay from the defendant twice. The first time was in September on the Wednesday or Thursday after his injury. At that time he got what he had made in August. Then he went back again in October, about the fifteenth of the month, which was the next pay day. At that time he got what he had earned in September, $24.75. He testifies that he never got anything more.

The next assignment of error is that the damages are excessive. This is plainly untenable. Considering the amount of damages awarded by juries in cases of this kind which are every day affirmed, this award cannot be regarded as excessive. Nor is there, in the manner in which the jury made the award, evidence of prejudice. They returned a verdict for the plaintiff, awarding him damages in the sum $1,562 less the sum of $62 paid by the defendant under the terms of the release given in evidence. In cases of this kind there is no rule of law prescribing a measure of damages, but the jury are remitted to giving a round sum under all the circumstances of the case; and the verdict which they returned, and the manner in which they returned it, clearly indicate a purpose on their party to give the plaintiff the round sum of $1,500 under all the circumstances of the case, and after deducting what the defendant had laid out in his behalf.

Judgment is accordingly affirmed. The other judges concur.

ROMBAUER, P. J.—We continued the motion for rehearing in this case to await the final ruling of the supreme court in *Mateer v. Railroad*, which case involves propositions similar to the one at bar. That case has since been decided (16 S. W. Rep. 839), and the opinion filed therein has been carefully examined. That case impliedly concedes that the validity of releases of this character may be tried upon answer and

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reply in actions at law, and that the rules governing the trial of the question are in such event in main the rules applicable to trials at law. In so holding the decision is in harmony with our ruling in this case. We concede that there is something incongruous in the proposition, that the character and extent of the evidence required to vacate a written contract should be dependent upon the fact, whether the proceeding is one at law or in equity, and thus enable a plaintiff, by giving him the choice of the tribunal, to vacate a written contract *at law*, upon evidence which would be insufficient had he proceeded *in equity*. This incongruity, however, necessarily arises in every case wherein the jurisdiction at law and in equity are concurrent, at least in those states whose courts like ours adhere to the proposition, that in actions at law the credibility of witnesses is a question for the jury.

While we are aware that it is difficult to reconcile the *reasoning* of the supreme court in the case of *Vautrain v. Railroad*, 78 Mo. 44, and *Mateer v. Railroad*, *supra*, with its reasoning in the case of *Blair v. Railroad*, 89 Mo. 383, and to reconcile the reasoning in either of these cases with ours in the present case, the majority of this court are of the opinion that there is nothing in the *decision* of either of those cases, which makes it a *controlling decision* opposed to the result arrived at in the case at bar. The motion for rehearing must, therefore, be overruled. All the members of the court concur in the view that the case raises propositions of pleading and evidence which should be set finally at rest by some controlling decision of the supreme court, and, as Judge BIGGS is of opinion that the case is one which, within the purview of the constitution, should be certified to the supreme court, it is ordered that it be so certified, and that all further proceedings therein be stayed until the final decision of that court.

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SEPARATE OPINION, ON MOTION FOR REHEARING.

Biggs, J.—A re-examination of this case, on the motion for rehearing, has led me to the conclusion that the judgment of the circuit court ought to be reversed. The effect of our opinion is to hold that a contract may be rescinded in an action at law. This, I do not think can be done. Where the execution of a contract is admitted, a court of law can only recognize and enforce its legal effect. If one of the contracting parties wishes, by judicial action, to be released from it, he must apply to a court of equity. Where, however, a contract has been obtained by fraud, it is permissible for the defrauded party, on his own motion, without the aid of any court, to rescind it, if he acts promptly after the discovery of the fraud. But, in order to make the rescission complete, he must return, or offer to return, whatever of value he may have received on account of such contract. There is an exception to this general rule where an unquestioned claim has been compromised by the payment of a smaller sum. But this case does not come within the exception, because the original liability was a matter of controversy. In the present action it is admitted, or at least the jury so found, that the plaintiff received under the contract about $10 in money and medical attendance furnished by the defendant of the value of $50. Until these amounts were returned, or offered to be returned, to the defendant, the plaintiff's *contract of compromise stood as a legal bar to the prosecution of his original cause of action.* If the money *had* been returned, then the plaintiff could have proceeded with his action, upon the theory that the contract had been rescinded, and his plea of fraud in the reply could then have been supplemented and supported by his act of avoidance or rescission, which in my opinion was absolutely necessary to make the plea good. Courts of law may try such an issue on the theory that

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the right of rescission has been exercised by the plaintiff, and, if it is developed on the trial that such right was available, the rights of the parties would then be determined as if the contract had never existed. In this way a court of law may make effective previous acts of rescission, but in doing so it cannot be said that the court annulled or canceled the contract.

What has been said is supported by the supreme court of New York (*Gould v. Bank*, 86 N. Y 75; *Cobb v. Hatfield*, 46 N. Y. 533); the supreme court of Georgia (*East Tenn., etc., Ry. Co. v. Hayes*, 10 S. E. Rep. 350); the supreme court of Massachusetts (*Thayer v. Turner*, 8 Metc. 550; *Kimball v. Cunningham*, 4 Mass. 502); the supreme court of Illinois (*Doane v. Lockwood*, 115 Ill. 490; *Moriarty v. Stofferan*, 89 Ill. 528); the supreme court of New Hampshire (*Pierce v. Wood*, 3 Foster, 519); and Bigelow on Fraud, sections 74, 75.

The case of *East Tenn., etc., Ry. Co. v. Hayes, supra*, was exactly like the case at bar. There had been a compromise settlement, and the railroad company had paid Hayes $100. The company interposed the compromise agreement in bar of the action, and Hayes replied that it was obtained by fraud. The sole question in the case was, whether Hayes could recover on his original cause of action, unless it appeared that he had returned, or offered to return, the money before the commencement of the suit. The court, in a well-considered opinion, held that a return of the money before the commencement of his action was a condition precedent to the right to maintain it. It was said: "While fraud may vitiate or avoid all contracts, the contract is nevertheless not void, but voidable only, at the instance of the person defrauded. He who perpetrates the fraud cannot avoid the same, or vitiate it, on account of his own conduct. It may be a good contract until it is avoided by the action or at the instance of him who is defrauded. * * * Something must be

done by the party defrauded before the contract can cease to bind. When that something has been done, and the engagement has been terminated, the contract is said to have been rescinded, and the process by which this result is effected is called rescission. A contract may be rescinded, out of court, at the instance of the party defrauded, where an agreement has been made, and something of value has been received by the defrauded party, whether vendor or purchaser it matters not. This must, before suit, be tendered back to the wrong-doer in the name of rescission, with demand of return of what the wrong-doer has received. The object of the tender is to effect a restoration of the *status quo*, and in this class of cases it is a condition precedent to rescission."

The case of *Gould v. Bank*, *supra*, is also a similar case to the one under consideration. In that case the supreme court of New York collected and commented on all the reported cases, and, in a very exhaustive and satisfactory opinion, came to the conclusion that, where there had been a compromise of a cause of action and anything of value had been paid on account of it, a suit could not be based on the matters thus settled, unless the contract had been previously rescinded by the judgment of a court, or by the plaintiff returning or offering to return whatever of value he received under the contract. The court said: "The compromise agreement, unless annulled, is an *absolute bar* to the action. It is a general rule laid down in the text-books and reported cases, that a party who seeks to rescind a contract into which he has been induced to enter by fraud must restore to the other party whatever he has obtained by virtue of the contract. *Cobb v. Hatfield*, 46 N. Y. 533. He cannot retain anything he received under the contract and yet proceed in disaffirmance thereof. * * * But the claim of the plaintiff is that because it was finally determined by the court that the sum paid the plaintiff and much more was due him from the bank,

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the fact that he did not return the money furnished no defense to the action. It is believed, that this claim, under the circumstances of this case, has no sound basis of principle or authority to rest on." Further on in the opinion the court said: "The difference between an action to rescind a contract and one brought, not to rescind it, but based upon the theory that it has already been rescinded, is as broad as a gulf. They depend upon different principles and require different judgments."

It would serve no good purpose to quote further from the authorities cited. An examination of them will show that, where a matter in dispute has been compromised, and an action is based on the original relations between the parties, the plaintiff must show that, previous to the commencement of the action, he rescinded the contract of settlement by placing his adversary *in statu quo*, that is by paying back to him the consideration of the contract. The contrary to this seems to me to be illogical, unless a contract obtained by fraud is void *ab initio*. If this rule be adopted, then neither party would be bound, which is contrary to the great weight of authority. Such a contract is absolutely binding on the party practicing the fraud, and it is only voidable at the instance of the party defrauded. It cannot be said that a contract is absolutely binding on one party, and absolutely void as to the other.

I find nothing in the decisions of our own court which are opposed to the views herein expressed. In the case of *Vautrain v. Railroad*, 78 Mo. 44, the plaintiff denied that he received any money or anything else of value in settlement of his action.

In *Blair v. Railroad*, 89 Mo. 383, there was an equitable count which was first tried by the court, and in this trial the compromise agreement was set aside, and the plaintiff ordered to deposit in court the amount received by her under the compromise. When an action for rescission is brought in a court of equity, it

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is only necessary for the plaintiff in his petition to offer to return or restore to the defendant what he has received. *Allerton v. Allerton*, 50 N. Y. 670.

In *Muteer v. Railroad*, 16 S. W. Rep. 839, the plaintiff, as in the *Vautrain case*, denied that he had received anything by way of compensation for the injuries received. I, therefore, conclude that the circuit court committed error in refusing the defendant's seventeenth instruction.

On other branches of the case I agree with my associates, but it seemed to me that our reasoning was so much opposed to that of the supreme court in some of the cases cited that the case ought to be certified. In fact I think that our decision on the *quantum* of evidence necessary to sustain the issue of fraud, or other ground of rescission, is opposed to the decision of the supreme court in the *Vautrain case*.

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THE WESTERN UNION TELEGRAPH COMPANY, Respondent, v. GUERNSEY & SCUDDER ELECTRIC LIGHT COMPANY, Appellant.

St. Louis Court of Appeals, June 2, 1891.

1. **City of St. Louis**: REGULATION OF THE USE OF STREETS. The city of St. Louis has the charter power to regulate the use of streets within its limits, and this power is not limited to the regulation of the use of streets for travel, but extends to other beneficial uses which the public good and convenience may from time to time require, and, among other things, to the erection of poles and stringing thereon of wires for the supply of electric light by private corporations to consumers.

2. ——— : ———. Such power may be exercised both as to an adjoining owner and as to a licensee having prior rights of user, such as the Western Union Telegraph Company, and may subject either to inconvenience, so long as it does not amount to a substantial subversion of private rights. The fact, that said telegraph

company was inconvenienced, would, therefore, not render the exercise of the power illegal, so long as its rights were not substantially invaded; but that company is nevertheless, owing to the nature of its obligations, entitled to have the rigid protection of the law thrown around the instrumentalities which are essential to the faithful performance of its duties.

3. **Injunction:** PLEADING. Electric light wires were erected by virtue of a municipal ordinance amidst the wires of the Western Union Telegraph Company, and, in an action brought by that company, the electric light company, which had erected these poles, was enjoined from stringing its wires on these poles within a certain distance of the wires of the telegraph company. At the trial it appeared from the evidence that it was not the intention of the electric light company to string its wires within that distance; but, although the defendant was charged with such an intention, there was no disclaimer thereof in its pleadings. It also appeared from the evidence that, at the time of the institution of the action, the poles were mortised for cross arms for wires within the distance mentioned, but that this had been done pursuant to a municipal regulation. *Held*, THOMPSON, J., *dissenting*, that, under these circumstances, the evidence at the trial in regard to the intention of the electric light company was not ground for disturbing the judgment of the trial court.

4. **Evidence:** TESTIMONY OF EXPERTS. The testimony of experts is at most advisory, and its weight is to be determined by the experience and knowledge, however acquired, which the trier of the facts has of the subject-matter under consideration.

5. **Injunctions:** RIGHT OF PLAINTIFF TO RELIEF. *Semble* that the rule that a plaintiff is not entitled to relief by injunction against a mischief, when he can guard against it at a slight expense, does not obtain in this state.

6. ——— : ———. The evidence in this cause is reviewed, and it is *held*, THOMPSON, J., *dissenting*, that injunction was the proper remedy in the case, since the plaintiff's right in controversy was unquestioned and there was a fair probability of a substantial interference with that right, justifying recourse to a court of equity before the threatened wrong was done, and since an action for damages would not have afforded an adequate remedy.

Per Thompson, J., dissenting:

7. **Injunctions:** RIGHT OF PLAINTIFF TO RELIEF. If the act complained of is not a nuisance *per se*, but may or may not become a nuisance according to the circumstances, and whether it will operate injuriously is uncertain or contingent, equity will not interfere by injunction.

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8. ——: ——. When it is sought to restrain a defendant in the lawful pursuit of his business and management of his property, although not upon his own land, and it does not appear that the act or threatened act of the defendant will probably produce serious injury to the plaintiff, the injunction should not be granted; nor should the injunction be granted when the threatened injury, though probable otherwise, can be avoided by the plaintiff by means of a precaution involving only a slight expenditure on his part.

Appeal from the St. Louis City Circuit Court.—HON. GEORGE W. LUBKE, Judge.

AFFIRMED.

Boyle, Adams & McKeighan, for appellant.

(1) An injunction cannot, under any circumstances, be granted restraining the defendant from the doing of an act, however wrongful it may be, unless it is clearly and satisfactorily shown that the defendant threatens or presently intends to do the particular thing enjoined. Therefore, the court erred in entering a decree against appellant restraining it from stretching its wires nearer than eight feet to respondent's wires, the evidence being that appellant under no circumstances intended to go nearer than ten feet. Besides, the evidence failed to establish clearly, or at all, that injury or unreasonable interference would be caused by appellant stretching its wires nearer than eight feet. (2) The injunction in this case is in the nature of a mandatory injunction, since by the temporary injunction and final decree perpetuating it, appellant is enjoined from generating and transmitting electricity through its wires, unless it will do something, viz., stretch a net wire work or other substitute under its wires. This is the same thing as decreeing that it shall do the thing specified. While courts of equity have the power to issue mandatory injunctions, it is not a power which is regarded with favor; on the contrary,

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courts of equity use it with great reluctance, and only under special circumstances, and with great caution; its exercise is to be confined to cases where there is no other remedy. 1 High on Inj., sec. 12; Kerr on Inj. 230, 231; Drewsy on Inj. 265. Unless the damages which would ensue from withholding a mandatory injunction will be extreme, the writ should not be issued. *Durrell v. Pritchard*, L. R. Ch. App. 274; *Brewsey v. Tremaunt*, L. R. 9 Ch. App. 219. (3) The evidence in this case shows that appellant is as rightfully upon the street in question as respondent, although the respondent used the street for its business before appellant. The appellant was, and is, upon the street by virtue of lawful municipal law or ordinance. A prior user of a street has no superior right to other subsequent users. Therefore, a right of action by the former against the latter must depend upon the question of negligence. All that is required of any person using the street is reasonable use and care. *Macomber v. Metols*, 34 Mich. 212. Persons using the highway have no prescriptive rights. A highway must admit of new uses whenever the general benefit requires it. New uses are constantly arising, and private rights must yield to them. The power to regulate the use is not limited to the mere right of way, but extends to all beneficial uses which the public good may from time to time require. *Ferrenbach v. Turner*, 86 Mo. 416 (affirming this court); *Building Co. v. Tel. Co.*, 88 Mo. 258; s. c., 13 Mo. App. 447. (4) The evidence in this case on both sides showed that if any injury or damage should ever happen to respondent's property or employes from the electricity generated by appellant's dynamo machines and transmitted through its wires, such damage or injury would, and could, not happen at all when appellant's machines and wires are in their normal position, and could only result, if at all, from appellant's wires breaking from some unusual cause, or

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through negligence, and the ends falling upon respondent's wires, and certain concurrent, but not inevitable or even probable, conditions being present. The evidence does not establish that the dangers apprehended by respondent as a basis for an injunction were either certain, imminent, constant or highly probable, but on the contrary the great and overwhelming weight of the testimony was, and is, that such apprehended dangers were, and are, uncertain, improbable, accidental, remote, speculative, contingent and barely possible under very unusual circumstances or conditions, or the result of negligence. Under such a state of facts a lawful business cannot be interrupted, or enjoined, or unusual or arbitrary conditions be imposed on its continuance beyond what public authority has imposed in granting it the right to enter upon, and use, the streets. A lawful business is not a nuisance, nor do the defendant's wires and business constitute a public nuisance, since the defendant is authorized by law to stretch its wires and transmit electricity through them. Wood on Nuisances, secs. 1, 15, 16; *Hinchman v. Railroad*, 2 C. E. Green, p. 75; *Gay v. Tel. Co.*, 12 Mo. App. 485; High on Inj., sec. 767. Nor should such business be interfered with by injunction under the facts of this case. High on Inj., secs. 740, 742, 752, 787, 788, 818; *Rhodes v. Dunbar*, 57 Pa. St. 274; *Building Co. v. Tel. Co.*, 88 Mo. 258; *Gay v. Tel. Co.*, 12 Mo. App. 485; *Flint v. Russell*, 5 Dill. 151; *Railroad v. Applegate*, 8 Dana, 289; *Carpenter v. Cummings*, 2 Phil. 76; *Bigelow v. Bridge Co.*, 14 Conn. 565; *Spencer v. R. W. Co.*, 8 Sims, 193; *Earl of Repin v. Hobart*, 3 Wylore & Keene, 169; *Duncan v. Hayes*, 7 C. E. Green, 25. (5) But it is clearly shown that any injury or danger which might, under any possible conditions, happen to respondent from the breaking of appellant's wires from some unusual and unprecedented storm, or some unforeseen accident, or through any possible negligence of appellant, can be avoided at small and trifling cost by the use

by respondent of a fusible plug placed on its wires near their entrance into its office. It is shown, and not contradicted, that in case of one of appellant's wires breaking and coming in contact with one of respondent's wires, and all other conditions being present necessary to cause a transmission of appellant's current of electricity over one of respondent's wires, this fusible plug would, by melting and opening the circuit, prevent appellant's current from going into respondent's office and doing any damage. The only inconvenience that would follow would be that the cause would have to be removed before the wire could be used, which would be in a very short time. An injunction against a nuisance will be granted only where there is a strong and mischievous case of pressing necessity, and not because of a trifling invasion of legal rights, or where it appears, that by a slight expenditure of money the danger or annoyance may be avoided. *Rosser v. Randolph*, 7 Porter, 233. (6) When a summary remedy is provided by statute for the abatement of the nuisance by the municipal authorities, a court of equity may properly refuse to interfere by injunction, when no obstacle is shown to be in the way of proceeding at law. 1 High, 745; *Powell v. Foster*, 59 Ga. 790. Article 3, scheme and charter, section 25, subdivision 6, provides for the abatement of all nuisances by the municipal authorities in a summary way.

Hitchcock, Madill & Finkelnburg, for respondent.

(1) An injunction is the most flexible of remedies. The trial court, or the appellate court, may, by its final decision, continue or dissolve, in part or in whole, or may in any manner modify an injunction already granted. *Cassidy v. Metcalf*, 66 Mo. 519, 535; 1 High on Inj., sec. 39, note 5; *Tucker v. Carpenter*, Hemp. 441. In general, relief by injunction should be granted if it appear from the whole proof, that defendant

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threatens to do, or continue doing, some act complained of; or that thereby some lawful right of plaintiff will be denied or interfered with, without legal excuse therefor; and that for such threatened injury no adequate remedy is afforded by an action for damages as such, as, if it appeared that the injury apprehended would be a recurring one, requiring a multiplicity of suits for damages; and it is not necessary that such injury should be irreparable. *Towne v. Bowers*, 81 Mo. 491, 495-6; *Turner v. Stewart*, 78 Mo. 480, 482, and cases cited; *McPike v. West*, 71 Mo. 199, 200; *Bank v. Kercheval*, 65 Mo. 682; *Harris v. Board*, 22 Mo. App. 462. (2) Under the issues in this case, the decree below should be affirmed, if on the whole proof it appears that the apprehension of injury alleged by plaintiff is a reasonable one, though it be uncertain how frequently such injury will occur, or whether it may or may not, in every detail, correspond with plaintiff's averments thereof; and that, if and whenever such injury should occur, there is a real danger of serious damage to plaintiff, in respect of its property or the profitable conduct of its business, or any obstruction thereto, as authorized by said act of congress, or in respect of the safety of its employes in fulfilling their ordinary duties, or all of these; and that there is no adequate remedy therefor by an action for damages as such—whether because it would require a multiplicity of suits, or would involve a loss of profits difficult to estimate, or both. Plaintiff is entitled to relief by injunction if there be probable ground for believing that, unless such relief be granted, the injury apprehended will occur. It is no defense to urge that plaintiff can avoid such injury, at an additional expense, by some device or expedient not needed except for defendant's acts complained of; *a fortiori*, if such expedient would merely substitute one kind of injury for another, as in the case of fusible plugs. 1 High on Injunctions, sec. 22. And in determining the questions of fact

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involved, including physical or natural laws, the courts will take judicial notice of "such matters of science as are involved in the cases brought before them," and may consult works on science in relation thereto. *Brown v. Piper*, 91 U. S. 42; 1 Whart. Ev., secs. 282, 335. (3) Plaintiff is entitled, under the act of congress of July 24, 1866 (R. S. U. S., sec. 5263), duly accepted by it, to maintain and operate its telegraph lines on Locust street, in the city of St. Louis, without interference by any other person with the safe and ordinary operation thereof. Said act is paramount to any state law, or municipal ordinance. That act was an exercise of the power of congress over interstate commerce, and is binding on "the judges in every state." *Tel. Co. v. Tel. Co.*, 96 U. S. 11; U. S. Const., art. 1, sec. 8, art. 6, par. 2. Any state law, though purporting to be enacted under the police power of the state, which conflicts with said act of congress, is void. The "settled doctrine" of the United States supreme court on this subject includes every attempted interference with interstate commerce, under the authority of a state. *Railroad v. Husen*, 95 U. S. 465, 470-71; *Brown v. Houston*, 114 U. S. 622, 630, 632. Defendant's alleged right, under the city ordinances of St. Louis, to erect and maintain its poles and wires in such manner as to interfere with plaintiff's right, under said act of congress, to carry on its telegraph business without interference or obstruction, would be a violation of said act of congress. A refusal by any state court to require third persons to abstain from interfering therewith would be a denial of plaintiff's rights under article 1, section 8, and article 6, paragraph 2, of the United States constitution. (4) The defendant's poles were not rightfully erected on Locust street. City ordinance number 12723 conferred no such right, for the city charter contains no authority for its enactment. On this ground alone, on the proof made, plaintiff is entitled to equitable relief. 2 R. S. 1879, pp. 1585-8;

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City Charter, art. 3, sec. 26; 2 Dillon, Mun. Corp., secs. 660, 698, and cases cited.

ROMBAUER, P. J.—This is a suit in equity to enjoin the defendant from transmitting currents of electricity through certain wires which it has suspended in proximity to the telegraph wires of the plaintiff. At the hearing there was a decree denying the relief sought, and dismissing the petition as to a portion of the wires of the defendant, and granting the relief sought, in a modified form, as to the remainder. From this decree the defendant prosecutes this appeal.

The petition recites the incorporation of the plaintiff and its acquisition, under various acts of congress, and through its consolidation with the American Union Telegraph Company in pursuance of the laws of the state of New York, of the right to maintain its wires on any post-route, and pleads the act of congress of March 1, 1884, which makes all public roads and highways post-routes. It recites facts showing that a portion of Locust street, in the city of St. Louis, is a post-route within the meaning of this statute, and that that portion of said street between Third and Fourth streets was, on or about the year 1880, occupied by the telegraph lines of the American Union Telegraph Company, which lines afterwards became, in pursuance of the consolidation already spoken of, the property of the plaintiff. It recites that the plaintiff had, for more than four years prior to the commencement of the suit, occupied and used those lines in its business as a telegraph company; asserts its right to continue in the use of them free from interruption or disturbance; recites facts showing the extensive character of the plaintiff's business in transmitting messages to all parts of the United States, and the importance of such business, not only to individuals, but also to the public authorities of the city of St. Louis, the state of Missouri and the United States. It then states that more than fifty telegraph wires are

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strung and supported on the plaintiff's poles on Locust street between Third and Fourth streets; that each one is a conductor of electricity, and would, if brought in contact with any other body charged with a current of electricity, or with any other wire or conductor communicating with any other apparatus generating electricity, necessarily take up and transmit from such other body, or such other conductor, any current of electricity with which the same was charged, or which was being transmitted thereby, and would conduct such electricity into the offices of the plaintiff and into such apparatus of the plaintiff in its offices as are connected with the plaintiff's wires, endangering the plaintiff's property by burning up its telegraph instruments, setting fire to the premises occupied by its main and branch offices, and destroying the lives of its employes.

The petition then recites the incorporation of the defendant for the purpose of supplying light by means of electricity to persons in the city of St. Louis from its premises on number 306 Locust street in said city; describes the manner by which the defendant, for the purpose of producing electric lights, generates by means of dynamo electric machines, and transmits by means of wires, powerful and intense currents of electricity.

The petition then states that within the four weeks preceding the institution of this suit the defendant erected three poles on the south side of Locust street, one hundred and fifty feet apart from each other, and higher than the plaintiff's poles, and has strung upon the poles thus erected six wires, four of them directly above, and two directly below, the plaintiff's wires; that all of the defendant's wires are connected with its dynamos, and are used for the transmission of powerful currents of electricity to various parts of the city.

The petition also states that wires, such as are strung between the defendant's poles, are at all times liable to be broken, and that it frequently happens (owing to causes which are enumerated) that wires

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strung between poles so far apart are broken; that, in case the defendant's upper wires are thus broken, they would unavoidably fall on the plaintiff's wires, and in such event it would instantly and unavoidably result that the powerful currents of electricity, generated by the defendant and transmitted through its wires, would be transmitted through one or more of plaintiff's telegraph wires, and be conducted into the plaintiff's offices, and to the telegraphic instruments and apparatus there employed by plaintiff, to the interruption of the plaintiff's business, and to the imminent danger of its property and the safety and lives of its employes.

The petition further states that the same result would follow in case the plaintiff's wires broke and came in contact with the defendant's wires strung immediately below them; that such accidents have repeatedly occurred and are dreaded by telegraph operators and repairers of wires, causing in many instances death and personal injuries.

The petition also states that the plaintiff has requested the defendant to either remove said wires, or else so place them as to avoid the dangers aforesaid; but that the defendant refuses to comply with such request, and intends not only to continue the use of said wires in the manner aforesaid, but also to increase said dangers by placing additional wires on its poles for like purposes. The petition concludes with a prayer for an injunction restraining the defendant in the use of said wires for the purposes and in the manner aforesaid, and for general relief.

Due notice of the application for a temporary restraining order was given, and it was heard by the court on affidavits filed both in support and in opposition thereof, whereupon the court, upon the plaintiff's giving bond in form and amount required, made a temporary restraining order, enjoining the defendant:

First. From transmitting any electric currents through its wires, strung *below* those of the plaintiff,

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because the transmission of such currents was dangerous to plaintiff's employes, and prohibiting the defendant from stringing any more wires below the wires of plaintiff for the use of electric light wires.

Second. From placing for the purposes of its business any electric light wires *above* those of the plaintiff, nearer than *three feet* to plaintiff's wires.

Third. And ordering the defendant to place below its wires already strung some net work or sufficient guard to prevent its wires, in case of breakage or sagging, from coming into contact with the plaintiff's wires.

An order to that effect was served upon the defendant. More than one month after service of this order upon the defendant, the latter filed its answer, accompanied by a motion to dissolve the injunction. The answer consists first of a general denial. It then recites the incorporation of the defendant for the purpose of manufacturing and vending electric light; that its chief office and place of business was, and had for some time been, at the southwest corner of Third and Locust streets in the city of St. Louis. It states that in order to supply its customers with light it became, was and is, necessary for it to stretch its wires on poles, erected, and to be erected, upon and along the streets of St. Louis between the southwest corner of Third and Locust streets, the place where its dynamo machines used in manufacturing said light were and are located, and the places of business of its customers where the light was and is supplied for the illumination and lighting of their places of business. It then recites the language of an ordinance enacted by the municipal assembly of the city of St. Louis on the fifteenth of March, 1884, numbered 12723, "regulating the placing of wires, tubes or cables conveying electricity for the production of light and power along the streets, alleys and public places of the city of St. Louis." This ordinance, which is embodied in the answer, will not be

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set out in full, but its provisions will be referred to, so far as may be necessary for the purpose of disposing of the questions arising upon this record. The answer next recites that afterwards the board of public improvements of the city of St. Louis adopted a series of rules and regulations with respect to the matters contained in said ordinance, which rules and regulations are also set out in the answer. These in like manner will be omitted, but their provisions will be referred to, should it become necessary in the course of this opinion.

The answer then proceeds to state that the defendant applied to the board of public improvements for permission to erect its poles and stretch its wires on the north side of Locust street, which permission was denied; that the defendant did obtain the permission of said board to erect its poles and stretch its wires on the south side of Locust street, and did so in strict conformity with the ordinances of the city, and the rules and regulations of the board, and under the supervision and control of the street commissioner; that its wires are stretched in the best practical way, are new and thoroughly insulated by asbestos and fireproof material; that it is impossible for any of said wires to sag or sway so as to touch the wires of plaintiff, and that it is altogether improbable that any of said wires will break in any of the usual weather or condition of the elements in St. Louis.

The answer further states that, if said wires, or either of them, should break asunder and fall so as to come in contact with plaintiff's wires, it would be harmless, as the fracture would necessarily break the current of electricity so that no damage would be done. The answer concludes with a prayer for a dissolution of the injunction, and judgment for costs.

The plaintiff replied, admitting the defendant's incorporation as stated, and the enactment of the city ordinance set out in the answer. The reply disclaimed information of the regulations of the board of public

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improvements, and of the fact whether the defendant, in what it did, conformed to the provisions of the ordinance, and the regulations of the board, if there were any. The reply further stated that neither the city, nor any municipal officer thereof, had power to authorize defendant to erect and maintain its poles and wires so as to interfere with the plaintiff's rights under the act of congress, and averred that the alleged claim of right of the defendant under the statute of this state, the ordinances of the city and the regulations of the board, was contrary to, and a denial of, plaintiff's rights under the act of congress and the constitution of the United States.

It must be noticed in this connection that, while the defendant was fully advised both by the plaintiff's petition and by the order of court that it had strung its wires both above and below those of the plaintiff, and was charged with the intention of not only continuing the use of its wires as thus strung, but also of stringing additional wires, regardless of any intervening space both above and below, the defendant did not disclaim either in its answer; or in the motion to dissolve, or, as far as the record shows, in the affidavits accompanying it, the intention thus charged.

Upon the final hearing the court modified the preliminary restraining order by removing the restraint as to defendant's lower wires altogether. This decision was not placed on the ground that the operation of such wires, if continued, would be less dangerous to the plaintiff's business or employes than the operation of the upper wires, but upon the sole ground that, prior to the institution of the suit, the plaintiff was advised that these wires were strung merely for a temporary purpose. The residue of the injunction, the court modified by enlarging the space which was to intervene between the defendant's and the plaintiff's wires, from three to eight feet. The injunction, as thus modified, was made perpetual.

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The defendant assigns for error, in substance, that the court erred in granting to plaintiff a temporary injunction and in making it perpetual, and particularly in restraining defendant from stretching its wires nearer than eight feet to plaintiff's wires, when the evidence failed to show, except by remote inference, any design on part of the defendant to stretch its wires nearer than ten feet to those of the plaintiff.

The city of St. Louis under its charter has power to "construct and keep in repair all bridges, streets, sewers and drains, and to regulate the use thereof" (Charter, art. 3, sec. 24, clause 2), and, also, to pass all such ordinances, not inconsistent with the provisions of the charter, or the laws of this state, as may be expedient in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures, and to enforce the same." Clause 14. "The power *to regulate the use*," says BLACK, J., in *Ferrenbach v. Turner*, 86 Mo. 416, "is not limited to a mere right of way, but it extends to all beneficial uses which the public good and convenience may from time to time require, as for laying gas, water and sewer pipes, and the like. New uses are constantly arising. All these, and many others, may be made of the streets without the consent of the lot-owners. Private rights must yield to them." In *Julia Building Ass'n v. Tel. Co.*, 13 Mo. App. 477, we held that the dedication or condemnation of public streets in a city does not limit their use to the purpose of passways for persons and vehicles, but extends to every use which may advance the public comfort and convenience within the legitimate sphere of municipal regulation. This decision was affirmed by the supreme court (88 Mo. 258), that court holding that "as civilization advances, new uses may be found expedient." The first of these cases was the case of a licensee, and the last that of an adjoining owner. We are, therefore, justified in assuming that there is no substantial difference in principle between the case of a

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licensee and that of an adjoining owner, and that the rights of each are subject to additional legitimate uses, which the city may make of the streets, even though such uses cause inconvenience to either, so long as they do not amount to a substantial subversion of private rights.

If then the streets of the city of St. Louis may lawfully be subjected to the servitude which the defendant claims, the power to regulate such a use is directly conferred by the provision of the charter above quoted. The servitude which the defendant claims being a proper municipal use, it is equally evident that the power is properly exercised under the charter by the board of public improvements under the ordinance set out. Courts cannot undertake to exercise a general superintendence over this matter, because they possess neither the technical knowledge nor the knowledge of detail which the subject requires, and because the delays, which necessarily attend judicial proceedings, would of themselves furnish a conclusive argument against such exercise. When, therefore, the defendant has shown by its answer and evidence that it has erected its poles and wires in the places and manner prescribed by the municipal authorities, and that the purpose for which the same are used is a proper municipal use to which the street may be subjected, it has made a *prima facie* case that its occupation of the street to the extent and in the manner aforesaid is lawful, and it is upon the plaintiff to overthrow such case. All this, the defendant has shown by its answer and evidence.

We take these preliminary observations in view of the claim made in the plaintiff's reply, that neither the city, nor any municipal officer thereof, had power to authorize the defendant to erect and maintain its poles and wires so as to interfere with the plaintiff's rights under the acts of congress. If, by this claim, the proposition is sought to be asserted, that because the plaintiff has occupied the south side of Locust street between Third and Fourth streets with its telegraph wires, it could

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by such prior occupation exclude the city and its licensees from using said part of the street for other municipal uses, even if by so doing the plaintiff was subjected to some inconvenience, the claim must be denied. If on the other hand by such claim nothing further is sought to be asserted than the proposition that, the plaintiff being a prior licensee on the street, and as such in the exercise of legal rights and duties, its rights could not be substantially invaded by a subsequent licensee of the city, the claim is correct. The plaintiff's rights and duties under national and state laws have indeed a material bearing in the determination of the question as to what interference is substantial enough to warrant the interposition of a court of equity, but have no bearing whatever in determining the exclusiveness of the plaintiff's right of occupation. As far as the exclusiveness of the right is concerned the plaintiff occupies simply the position of a prior licensee, and as such its rights cannot be of an exclusive character.

The evidence shows that, at the time of the commencement of this action, plaintiff had on the south side of Locust street five telegraph poles, one at the corner of Third and Locust streets, one at the corner of Fourth and Locust streets, and three intervening; that these poles were not exactly the same distance apart, the distance varying from forty to sixty feet; that, including the parts which were inserted in the ground, they were forty-one or forty-two feet in length; that upon each pole there were four cross-arms, commencing fifteen or eighteen inches below the top of the pole, and being placed at about that distance apart downwards; that there were eight pins of wood on each cross-arm for the support of wires, four on each side of the pole; and that on each there was screwed a glass insulator to which a wire was fastened. To the cross-arms were attached more than fifty wires, employed by the plaintiff in the conduct of its telegraph business. This business consisted in transmitting by

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electricity, for hire, messages of all kinds to many parts of the United States, and to foreign telegraph lines.

After the plaintiff had placed these poles and wires thus in position and use, the defendant, acting under a permit procured from the board of public improvements, which was granted to it in pursuance of the ordinance set out in the defendant's answer, and the regulations of the board of public improvements also there set out,—and after giving bond to the city in the sum of $20,000, as required by section 10 of the ordinance,—erected three poles on the south side of Locust street for the purpose of conducting electric light wires from its dynamos, which were situated in the basement of its building at number 306 Locust street. These poles were sixty feet in length, and were inserted seven feet in the ground. The first was erected at the corner of Third and Locust streets, and may be laid out of view, because no electric light wires were attached to it. The second was erected near the middle of the block, and near the defendant's building, number 306 Locust street, and the third was erected on the corner of Fourth and Locust streets, a distance of one hundred and twenty-six feet west of the second. These poles were erected substantially in line with the poles of the plaintiff. They rose up through the plaintiff's wires and extended upward much higher than the plaintiff's poles. They were mortised for cross-arms, the mortises beginning a foot below the top of the poles and running, with intervals of less than eighteen inches, three feet below the plaintiff's lowest cross-arms. At the commencement of this action the defendant had stretched four wires from the second of these poles, which stood near the middle of the block, westward to the third, which stood at the intersection with Fourth street. These wires were stretched on the highest cross-arm, and were fourteen or fifteen feet above the highest wire of the plaintiff. The defendant had also stretched two

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wires running on brackets below the plaintiff's wires. All these wires were copper wires, known in the trade and to electricians as "number 6 underwriters' wire." They were insulated by a covering of cotton, and outside of that a coating of asbestos paint. The testimony tends to show that while this is not a perfect insulator, because there are no perfect insulators, yet it is the best practicable one which had been brought into use. Over these wires the defendant sent powerful currents of electricity to supply certain light to its customers, by means of two electrical machines called dynamos, established in the basement of its building. These dynamos were of unequal power, one of them being capable of generating and transmitting a current of electricity of twelve hundred and fifty volts, while the other was capable of generating and transmitting one thousand volts. The evidence tends to show that, if a current of the intensity of one thousand volts were to pass through the body of a man, it would kill him; that a current of half this intensity might in some cases have the same effect; and that if such a current were communicated to one of the plaintiff's wires, it would probably burn the electric instruments with which the wire connected, and possibly set fire to the contrivance of the plaintiff called the switch-board, with which its wires are connected on entering its offices; but we do not understand the testimony as showing that this *would necessarily* endanger the plaintiff's employes, engaged in manipulating its telegraph instruments, although it *might* possibly do so. Several instruments belonging to the plaintiff had been burned by electric light wires coming in contact with its telegraph wires; but no damage of this kind had accrued from the defendant's wires, which were in use but a comparatively short time. These casualties had generally arisen from accidental contact between electric light wires and the plaintiff's telegraph wires, where they crossed each other in very close proximity,—but a few inches apart.

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Evidence was given by the plaintiff of two accidents, which were probably traceable to currents communicated by electric light wires. One of them was the burning of the Bell Telephone Company's exchange in the fifth story of the Third National Bank building in the city of St. Louis. The other resulted in the death of one of the plaintiff's linemen in the city of Pittsburg. The evidence concerning these two accidents was hypothetically stated to various expert witnesses, eliciting various opinions and theories. The sum of this class of evidence adduced by the plaintiff is, that there is undoubtedly danger, and very considerable danger, from the improper use of electric light wires in connection with telegraph wires, or from a contact between the two, or from an electric light wire coming in contact with a man. That the destruction of plaintiff's wires or instruments would cause a material interruption of its business, is substantially conceded by all the testimony, as well as the fact that the plaintiff's employes, in repairing plaintiff's wires, were liable to come into contact with the defendant's lower wires, and thereby incur great bodily risk.

The decree of the court, it will be perceived, relates entirely to such wires as the defendant may be supposed to have intended to stretch *above* the wires of the plaintiff. As to those which were temporarily stretched *below*, and as to any which the defendant may be supposed to have intended to stretch below, the decree grants no relief. As to any wires of the defendant *above* the plaintiff's wires, the decree contains two prohibitions: *First.* Against extending any wires nearer to the plaintiff's wires than eight feet. *Second.* Against maintaining any wires above the plaintiff's wires, without placing thereunder a wire net work, or other safe and suitable guard, to prevent defendant's wires from sagging or falling on the wires of the plaintiff, or coming nearer thereto than eight feet.

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The dangers which the plaintiff seeks to avoid are threefold: *First.* The transmission of powerful currents of electricity from defendant's wires to plaintiff's wires by actual contact, in consequence of the sagging or breaking of the defendant's wires. *Second.* The disturbance of the electric current upon the plaintiff's wires, by induction from the defendant's wires. *Third.* The dangers to the plaintiff's employes by coming into actual contact with the defendant's lower wires.

Touching the danger of actual contact by sagging, the defendant gave evidence tending to show that it was not its intention to string its wires closer than ten feet to plaintiff's wires from above, and that, with wires strung at such distance, a contact by sagging is next to impossible. It was shown that the defendant's employes, as well as those of the city, were charged with a continuous duty of inspection, rendering such a contact highly improbable. In reply to the argument it may be said that as to defendant's intention the plaintiff had a right to act on appearances, unless otherwise advised, when it applied for the relief. The defendant's poles, as shown above, were mortised for cross-arms at close intervals where they passed through the plaintiff's wires. While such mortising may have been done rather in compliance with the regulations of the municipal board, than with any intention of actual use of the cross-arms which might be inserted for electric light wires, the answer makes no disclaimer of the defendant's intention to use them according to appearances. In view of the fact that no such disclaimer was made, the decree of the court, prohibiting the defendant from stringing its wires nearer than eight feet above those of the plaintiff, if tenable on other grounds, was warranted. It is not apparent how the defendant can complain of that part of the decree, since it simply gives a binding effect to its intention in that behalf. The question at most is a question of costs, which the

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defendant could easily have avoided by filing a formal disclaimer.

The danger of contact by breakage, as appears from the evidence, may be caused either by the defendant's wires breaking and falling on those of the plaintiff strung below, or by the plaintiff's wires breaking and falling on those of the defendant below. The latter is far more likely to happen than the former, since the plaintiff's wires are of iron, of slight dimensions and subject to rust, while the defendant's wires are copper, are thoroughly insulated, and are thicker and stronger. While the danger of the breakage of the defendant's wires is not excluded by the testimony, it is doubtful whether such a contingency is sufficiently proximate to warrant that part of the decree, which requires a net work or other protection to be placed below the defendant's upper wires to prevent their contact with the plaintiff's wires in case of breakage. On that question, for the reason hereinafter stated, we need express no opinion, as, under the existing facts of this case, the question is not as to the form of relief actually granted, but as to whether the plaintiff was entitled to equitable relief by injunction at the date of the institution of the suit.

As to the results which would follow in case of a breakage and contact between an electric light and a telegraph wire, the testimony is far from satisfactory. The expert testimony of the defendant tends to establish the theory that, if an electric light wire breaks, the current at once ceases to flow over it, unless the separate parts should fall so as to form two grounds; that if both of the broken wires, not protected by the insulated covering, should touch the ground the current would continue to flow, but, if one end only should touch the ground, the only consequence would be the cessation of the flow of the current from the dynamo. The attention of a number of these witnesses was, on cross-examination, called to occurrences which were testified to by eye-witnesses, and which they could not

satisfactorily explain on the two-ground theory. It is manifest from all of the evidence that either the theory itself is not thoroughly sound, or else that the conditions which bring about the formation of a second ground are so little known, that they constitute a hidden danger which cannot be guarded against. In view of the notorious fact that hundreds of fatal accidents have happened by contact with electric light wires during the comparatively short time they are in use, many of them by breakage, and many of them in this city; and in view of the further fact that such dangers are generally recognized by scientists, it avails little that expert testimony can be found to the effect, that the danger is opposed to a certain theory, and, therefore, is nominal and remote. Expert testimony is at most advisory, and its weight is determined by the experience and knowledge, however acquired, which the triers of the fact have of the subject-matter under consideration. Weighing the evidence in light of all these facts, we must conclude that, even as to the danger which might arise from a probable breakage of wires, the circumstances at the date of the issue of the restraining order were such as to justify the equitable interposition of the court.

It is in this connection that the plaintiff's rights and duties as fixed by law become material. The plaintiff is a carrier in the service of the public, and its duties as such are regulated by law and enforced by the severest penalties. It is answerable in these penalties for any neglect in the speedy and accurate transmission of messages intrusted to its care. The fact that such messages are delayed or inaccurately transmitted, owing to an interruption of the electric current over its own wires, by causes over which it has no control, may be a defense, but it is one which in many cases it would be impossible for it to establish to the satisfaction of the triers of the fact. The plaintiff, therefore, has a right to insist that a rigid protection of the law should be

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thrown around the instrumentalities, which are essential to the faithful performance of its duties. The defendant is a mere volunteer. It makes whatever contraets it pleases with customers of its own selection, and even in cases of breach is answerable for ordinary damages only.

The argument has been advanced, and has been strongly pressed on our attention, that this danger to the plaintiff's instruments and operators might be avoided by inserting a device known as a fusible plug in the plaintiff's wires, where the same enter into the plaintiff's office. It is shown that such a plug melts if acted upon by an intense electric current, and that the plaintiff, by the insertion of such plugs, might guard against the danger of such intense currents passing by contact from the defendant's wires over its own, and entering its offices to the danger of its instruments and employes. It is evident, however, that such a device, even if it accomplished all that the defendant claims for it, could be only a partial remedy. It might protect the plaintiff's employes and instruments, but it would at the same time cause an interruption of the plaintiff's business by severing its wires at every place where the plug has melted. We must add in this connection however that the equity rule, recognized in some of the states, that a plaintiff is not entitled to relief by injunction against a mischief, when he can guard against it at a slight expense, has not met with the approval of our supreme court. In *Paddock v. Somes*, 14 S.W.Rep. 749, that eourt approvingly cites the following passage from Wood on Nuisances [2 Ed.] 506: "It is the duty of every person or public body to prevent a nuisance, and the fact that the person injured could, but does not, prevent damages to his property therefrom is no defense either to an action at law or in equity." The trial court in that case instructed the jury that the plaintiff could not recover, if he could have prevented the injury by a reasonable exertion and at a trifling expense, and its

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judgment was reversed for error, one of the grounds being the giving of this instruction.

Our statute provides (R. S. 1879, sec. 2722): "The remedy by writ of injunction or prohibition shall exist in all cases, where an injury to real or personal property is threatened, and the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action of damages."

Judge HOUGH in *Carpenter v. Grisham*, 59 Mo. 251, says that, even in respect of nuisances, "the modern doctrine of courts of equity is much more liberal than the ancient, and that the rule requiring the right to be first established at law prevails only *where the right itself is in dispute*, or is doubtful," citing High on Injunctions, section 516. Judge HENRY in *State Savings Bank v. Kercheval*, quoting the statute, says: "Would an action for damages here have afforded an adequate remedy, is the question, and not whether the threatened injury would have been irreparable." In *Overall v. Ruenzi*, 67 Mo. 207, Judge NAPTON says: "It is quite apparent that of late years, whether by reason of our statute in regard to injunctions first introduced in the revised code of 1865, or upon general grounds of expediency, this court has been disposed to regard with favor proceedings which are preventive in their character, rather than compel the injured party to seek redress after the damage is accomplished." So in *Parks v. People's Bank*, 97 Mo. 132, Judge BARCLAY holds that the remedy by injunction exists, even though the plaintiff have a legal remedy, if the remedy is not as full and adequate as that afforded by injunction. In fact quite a number of decisions, both of the supreme court and of this court of late years, whether in view of our statute or for other reasons, have so extended the remedy by injunction, that decisions of English courts and those of other states are of very little value. in determining in what cases it does or does not exist.

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Upon a review of the entire evidence we find that the case is not one wherein, in the language of some of the courts, the injury is so doubtful, eventual or contingent, as to furnish no ground for relief by injunction. The plaintiff's right is unquestioned, and the evidence shows a fair probability of a substantial interference with that right, so as to justify the plaintiff in invoking the protection of equity before the threatened dangers have culminated. The circumstances sufficiently show that, in the latter event, an adequate remedy would not be afforded by an action of damages. Whether the decree finally rendered is one which should be upheld in all its parts, or whether it might advantageously undergo modifications, is an inquiry which, under existing circumstances, is of a mere speculative character. While we are not officially advised that the conditions under which the decree was rendered have changed since its date, it is a notorious fact, well known to each member of this court, that since said date both the plaintiff's and defendant's buildings and the defendant's dynamos have been destroyed by fire; that the defendant has ceased to do business, and that the plaintiff's main office has been removed to a different street. Under these circumstances, a modification of the injunction would be a mere *brutum fulmen* subserving no useful purpose.

As far as the questions involved in the proceeding are concerned, they have been fully discussed in the opinion; and, as far as the question of costs is concerned, which now seems to be the only question needing adjudication, it is sufficiently disposed of by our holding, that the plaintiff was entitled to injunctive relief when the decree was rendered. Without committing ourselves to the propriety of the decree in all its parts, if it were still an issue in the case, we are of opinion that justice is best subserved by affirming it. Judgment affirmed; Judge BIGGS concurs; Judge THOMPSON dissents.

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THOMPSON, J. (*dissenting*).—I agree with much of the reasoning of the foregoing opinion, but not with all of it; and I do not agree with its result. My chief reason for not agreeing to the result is that the holding, that the plaintiff was entitled to any equitable relief in this case, sets a precedent for enjoining a large portion of the electric light wires in the city. For proof of this, we have only to use our eyes on almost any street, and especially in the business portion. My associates in their opinion disclaim an ability on the part of the courts to superintend the electric wires so as to prevent interferences, and yet they render a judgment which in itself involves an exercise of such a jurisdiction; and this upon two grounds: *First.* At the time when this suit was brought, the defendant had strung two wires below the wires of the plaintiff, which are shown to have been intended for the mere temporary purpose of its display at the exposition. *Second.* That, although their wires, which were strung above the wires of the plaintiff, did not approach the plaintiff's wires nearer than fourteen feet, yet, as the poles had notches on them, on which cross-bars *might* be placed and wires strung near enough to the plaintiff's wires to constitute an interference, this made that part of the decree harmless to them, although they never intended to come within ten feet of the plaintiff's wires, and although the reason why the poles were notched is fully explained by the evidence. A conclusion that will justify on these grounds a harassing litigation, involving the defendant in an interruption of its business and a large amount of costs, does not comport with my idea of equity. My idea is that, notwithstanding our statute relating to injunctions, the right to an injunction still remains a matter of justice and conscience, and that it is not a mere technical matter, like a common-law action of trespass. I also think that corporations are bound to the same offices of good neighborhood as individuals; and that one corporation ought not to be allowed to go

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into a court of equity, and get an injunction against the doing of an act by another corporation, when by stepping into the door of the latter it can be learned that it is not intended to do that act. In this case the business of the defendants has been interfered with by an injunction, not because they have inflicted, or intended to inflict, any injury upon the plaintiff, but because a man in the woods, without special instructions, in getting out some poles for electric light wires, cut certain notches on them in the regular way in which such poles were got out; and because a lawyer omitted to insert in an answer to a bill in equity a disclaimer of an intent on the part of the defendant to suspend wires below those of the plaintiff, when none had been suspended, except for a casual and temporary purpose; and all this, when the evidence does not show that either of them interfered with the plaintiff in conducting its business, or incommoding it, or endangered it, except in some remote and improbable contingency. As to these lower wires, the trial court has found that there was no cause for an injunction; that finding is not appealed from, and I do not understand that there is anything under this head for us to consider.

The view taken by my associates seems to involve a misapplication of the principles on which courts of equity grant or refuse injunctions to restrain threatened injuries, such as those complained of in this case. The settled rule is that, if the act complained of is not a nuisance *per se*, but may or may not become a nuisance according to circumstances, and whether it will operate injuriously is uncertain or contingent, equity will not interfere by injunction until the question is settled at law. 3 Pom. Eq. Jur., sec. 1350; 1 High on Injunc., sec. 745; Kerr on Injunc., 340; numerous cases cited in 73 Am. Dec. 114. A few quotations from judicial decisions will better illustrate the scope of the rule. Lord HARDWICKE, the founder of the present system of equity jurisprudence, expressed it thus: "Bills to

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restrain nuisances must extend only to such as are nuisances at law; and the fears of mankind, though they may be reasonable, will not create a nuisance." *Anon.*, 3 Atk. 750, quoted and applied in *Carpenter v. Cummings*, 2 Phila. 74, and in *Rhodes v. Dunbar*, 57 Pa. St. 274; s. c., 98 Am. Dec. 221, 226. "That a thing may possibly work injury to somebody, is no ground for injunction. If the injury be *doubtful*, *eventual or contingent*, equity will not interfere by injunction." *Rhodes v. Dunbar*, *supra; Butler v. Rogers*, 9 N. J. Eq. 487. "It is also very material to observe, what is indeed strong authority of a negative kind, that no instance can be produced of the intervention by injunction, in the case of what we have been regarding as eventual or contingent nuisances." Lord BROUGHAM, in *Earl of Ripon v. Hobert*, 3 Milne & K. 169; s. c., Coop. Temp. Brough., p. 333. "Where the thing sought to be restrained is not unavoidable and in itself noxious, but only something which may, according to circumstances, prove so, the court will refuse to interfere until the matter has been tried at law, generally by an action, though in particular cases an issue may be directed for the satisfaction of the court where an action could not be framed so as to meet the question." *Ib.* One court has expressed the rule in even stronger terms, where the purpose of the action was to restrain a proprietor in a lawful use of his own land: "Every doubt should be solved against the restraint of a proprietor, in the use of his own property for a purpose seemingly lawful, and conducive both to individual gain and the general welfare. Relief by injunction is so severe in its consequences, that it is not to be granted in such a case, except where the right to it is clearly and conclusively made out. To interfere with one's right to use his own land for the production of what he pleases, in a case of doubt, would be a flagrant abuse of power. It is not enough to show a probable and contingent injury, but

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it must be shown to be inevitable and undoubted." *McCutchen v. Blanton*, 59 Miss. 116. The same principle must apply, *mutatis mutandis*, in the case where it is sought to restrain by injunction a person or corporation in the lawful pursuit of its business and management of its property, although not upon its own land. It is not, however, necessary, and especially in view of the modern tendency to enlarge the scope of preventive remedies, to go to the length of holding that, in order to warrant relief by injunction in such a case as the one before us, the apprehended mischief must be shown to be inevitable and undoubted. We really have no occasion, for the purposes of this case, to apply a rule more severe than the rule, that the plaintiff is entitled to an injunction, if what the defendant has done, or is about to do, will *probably* produce serious injury to the property of the plaintiff, or will endanger the lives of its employes, or seriously interrupt its business. That a case has not been made out by the evidence which satisfies this principle, I am clear of doubt.

The decree of the court, it will be perceived, relates entirely to such wires as the defendant may be supposed to have intended to stretch *above* the wires of the plaintiff. As to those which were temporarily stretched *below*, and as to any which the defendant may be supposed to have intended to stretch below, the decree has made a final disposition in favor of the defendant, and the plaintiff does not appeal. As to any wires of the defendant *above* the plaintiff's wires, the decree contains two prohibitions: *First*. Against extending any wires nearer to the plaintiff's wires than eight feet. *Second*. Against maintaining any wires above the plaintiff's wires, without placing thereunder a wire net-work, or other safe and suitable guard, to prevent defendant's wires from sagging or falling on the wires of the plaintiff, or coming nearer thereto than eight feet.

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It has been justly observed by the learned counsel for the plaintiff in their printed argument that an injunction suit may be defended on the ground, either, *first*, that the defendant does not intend to do or continue the injurious act apprehended; or, *second*, that, if done, it will not injure the plaintiff as claimed; or, *third*, that the defendant has a lawful right to do it, even to the plaintiff's injury. I think that on the first of these grounds the evidence fails to support the decree. I find no evidence showing that the defendant ever intended to maintain any wires within eight feet of the plaintiff's wires. On the contrary, the testimony of Mr. Guernsey, the defendant's vice-president and manager, is distinctly to the effect, that it was the purpose of the defendant never to extend its wires nearer to the upper wires of the defendant than ten feet. This evidence is not directly contradicted, but an attempt is made to avoid its effect by appealing to the fact, that the three poles which the defendant erected on Locust street had fifteen notches for cross-arms cut upon them, extending from near the top downwards at a distance of seventeen and a half inches apart, the lowest of which notches was considerably below the lowest of the plaintiff's wires. But the evidence shows clearly that this was done to comply with a regulation of the board of public improvements, made under the ordinance pleaded in the answer, without which the defendant was prohibited by the board from erecting its poles and extending its wires at all. The ordinance contains this language: "Sec. 1. That no wires, tubes or cables conveying electricity for the production of light or power, shall be placed along or across any of the streets, alleys or public places in the city of St. Louis, except as hereinafter provided." Several succeeding sections provide for the filing of applications and the granting of permits for the erection of such wires, tubes or cables; and, then, comes the tenth section, which provides, among several other things, which need not be noticed,

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that the person or corporation availing itself of the privileges of the ordinance shall file an acceptance with the city register and a penal bond in the sum of $20,000, "that he or it will comply with all the regulations made by the board of public improvements, having reference to the subject embraced in this or any other ordinance for the purposes herein named." The evidence shows that such acceptance and bond were filed by the defendant with the city register as thus required. It further appears that the regulation, established by the board of public improvements under this ordinance, contained the following provisions in regard to granting permits: "No permit shall hereafter be granted for the erection of poles, unless the party making the application shall, in writing, agree: *First.* To erect poles of such dimensions as to admit of at least fifteen cross-bars of the usual size, at the ordinary distance, being placed thereon, except by special permission of the board. * * * *Third.* That it will grant to any other company, requiring electric light wires for its business, the right to use one or more of the cross-bars on its poles, at an annual rent of forty cents for a half cross-bar, and sixty cents for full cross-bar, except in cases where a party asking for room on another company's poles is itself charging that company a higher rent per cross-bar on its own poles heretofore erected, in which case an equal rental may be demanded for wires on the poles erected under these rules." Another rule of the board of public improvements, under the head of "rules for the guidance of the board," is as follows: "No permit shall be issued for more than one line of poles on any street, as long as the wires of the different parties can be accommodated by the poles of one line, under the regulations above stated. No permit for a third line of poles shall be given, except in case both sides of a street are already occupied by poles, erected under former permits, owned

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by parties who refuse to comply with the above regulations; such parties not being entitled to the privilege of using the poles erected by companies which conform to those regulations." The evidence shows that, when these poles were got out for the defendant, no instructions were given to the contractor as to notching them, but that he notched them as he did merely for the purpose of complying (as he supposed) with the ordinance, but really with the above regulations, made by the board of public improvements. The evidence, therefore, does not indicate a purpose on the part of the defendant to string its wires within eight feet of the plaintiff's wires, or nearer than ten feet of them. There was, therefore, no ground afforded by the evidence for so much of the decree as was intended to prevent the defendant's wires from being placed nearer to the plaintiff's wires than eight feet.

It remains to inquire upon the evidence whether there is reasonable ground for apprehending that the defendant's wires, although stretched above the plaintiff's wires at a distance of ten feet or more, would, in consequence of accidental circumstances, be likely to come into contact with the plaintiff's wires, or to come so near to them as to work substantial detriment to the plaintiff's property or business. The dangers which the plaintiff apprehends are two-fold: *First.* The transmission of powerful currents of electricity from the defendant's wires to the plaintiff's wires by actual contact, in consequence of defendant's wires *sagging* or *breaking*. *Second.* The disturbance of the electric currents upon the plaintiff's wires by induction from the defendant's wires. I shall speak of these elements of danger separately.

And, *first*, as to the danger of *sagging*. The evidence satisfies me that if, without breaking, one of the defendant's wires should sag so low as to come in contact with one of the plaintiff's wires, and if at the point of contact the insulating covering should be worn from

the defendant's wire, or if the weather should be wet, so that the covering would lose a portion of its insulating property, a current of electricity might be transmitted to the plaintiff's wire sufficiently strong to set fire to one of its switch-boards, or to a telegraphic instrument, unless the plaintiff should protect itself from such consequences by the use of a device called a fusible plug, which will be hereafter spoken of. But the evidence satisfies me that such a sagging is extremely improbable. The evidence tends to show that the limit of sagging of electric light wires, in this climate, between the points of greatest contraction from cold, and greatest expansion from heat, is not greater than from one foot to twenty inches, where the poles are not more than one hundred and twenty-five feet apart. There is some opinion evidence that it might be greater; there is also evidence that it would probably be less. The evidence also shows that the defendant and other electric light companies have men in their employ whose duty it is to inspect the wires, and to take up the slack whenever it is necessary to do so, and that the defendant's wires are inspected twice each day. The evidence shows that there is also in the street department of the city of St. Louis an inspector of electric wires, whose duty it is to notify the proprietors of such wires, whenever excessive sagging or any other defect is discovered. I must conclude on the whole evidence that any danger to the plaintiff's wires from the sagging of the defendant's wires is extremely improbable.

Secondly, as to the *breaking*. On this subject there is a general current of testimony in one direction. The sum of it is that, while telegraph wires frequently break, electric light wires have never been known to do so. No instance is given by any witness of the breaking of an electric light wire, while the testimony of the plaintiff's witnesses is to the effect, that the breaking of their telegraph wires is one of their regular sources of trouble. The reason is found in the difference between

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the two metals, copper and iron. The electric light wires are all of copper; the telegraph wires are generally of iron. Copper does not rust, in the sense in which the word is commonly employed, though it oxidizes slowly when exposed to the weather. From this its insulating cover measurably affords protection to an electric light wire. Telegraph wires, on the contrary, are not generally insulated; though they are to some extent protected from rusting by a coating of zinc. This does not, however, protect them from rust permanently, but they rapidly diminish in size in St. Louis, so that their life is but four or five years. Moreover, if a flaw exists in a telegraph wire, the rust attacks it there, and rapidly weakens it at that point. The danger of telegraph wires breaking and falling is, therefore, so great, and that of electric light wires breaking and falling so small, that one of the plaintiff's principal witnesses expressed the opinion that electric light wires were more dangerous to the plaintiff, when strung below the plaintiff's wires, than above them.

There is an equal concurrence in the scientific testimony as to the consequences, which would follow in case of the breaking of one of the defendant's wires, suspended above those of the plaintiff. An important difference between currents transmitted over telegraph wires, and those transmitted over electric light wires, consists in the fact that telegraph wires are "grounded," as it is called, while electric light wires are not "grounded." The testimony shows that electricity, if, as has been supposed, it is a substance, *travels* in a circuit, and if, as is supposed by some, it consists simply of a form of energy acting from one molecule of matter to another, *acts* in a circuit. In the case of telegraph wires, both ends are "grounded," and the earth completes the circuit according to theory; but in the case of electric light wires, neither end is "grounded," but the wire goes out, performs a circuit and returns to the dynamo, and the dynamo is not

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grounded but is carefully insulated from the ground. Now the testimony shows that, if an electric light wire breaks, the current at once ceases to flow over it, unless the separated parts should so fall as to form *two* "*grounds.*" If both of the broken wires, not protected by the insulating covering, should touch the ground, the current would continue to flow. If *one* end should touch the ground, or, perhaps to speak more accurately in the language of this science, should touch *a* "*ground,*" that is, any conducting substance not itself insulated from the earth, the only consequence would be the cessation of the flow of the current from the dynamo. A man can safely take hold of one of these electric light wires, when the dynamo is in motion, at a point where the wire is broken, without receiving any shock or injury whatever, provided he is sure that there is nowhere in the circuit a second "ground;" and that for the simple reason that the current is not flowing in case of a break, unless the circuit is completed by the existence of *two grounds.* One of the defendant's witnesses, an electrician of reputation, actually performed this experiment with one of the defendant's wires, taking hold of it with his moist hand, and without any injurious consequences. The evidence further satisfies me that, in order for injurious consequences to happen to the plaintiff from the breaking of one of the defendant's wires above the plaintiff's wires, it would be necessary for both of the broken ends of the defendant's wire to be "grounded" in some way, and for one of them to be "grounded" upon a wire of the plaintiff; and that, in order to be grounded on a wire of the plaintiff, its insulating covering must be worn off or rendered defective by the presence of water. If the two broken ends of the same wire of the defendant were to rest upon the same wire of the plaintiff, and at the point of contact both were deprived of their insulation, the whole current could be transmitted to the plaintiff's wire. But it is obvious from the whole testimony,

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first, that the danger of the defendant's wires breaking at all is very remote and improbable, and, *secondly*, that, in case one of them should break, the danger of such a contact with the plaintiff's wires, as would transmit their current to those wires, is extremely improbable. Injurious consequences from such an accident could hardly be anticipated under a reasonable inspection, especially in view of the uncontradicted testimony, that the defendant transmits electric currents over its wires only in the daytime. Undoubtedly, there is some danger. It would be unjust to the plaintiff to say that this action has been brought and prosecuted on grounds which are merely fanciful; but the danger may well be regarded as "doubtful, eventual or contingent," within the rule of the decisions above referred to.

But, even if the dangers which the plaintiff apprehends were probable, there is a general concurrence of expert testimony to the effect, that the injurious consequences apprehended from them might be prevented by slight expense on the part of the plaintiffs in inserting in each of its wires, at or near the point where it enters any of its buildings or offices, what is known as a *fusible plug*. This is a simple device, consisting of a section of leaden wire or strip of lead, inserted in the circuit, which melts when the current passing through the circuit reaches a certain intensity, breaking the circuit,—a result which would take place before the current would reach a sufficient intensity to burn a telegraphic instrument. The evidence shows that the cost of the fusible plugs would probably be four or five cents each, and that the cost of purchasing and inserting them in the fifty or more wires which pass over the plaintiff's poles on Locust street would not perhaps exceed $5 or $10. In actions at law for damages it is a maxim constantly applied, that the plaintiff cannot recover damages for an injury which might have been prevented by reasonable care on

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his part, *after* receiving the hurt from the defendant. In other words, the plaintiff in such a case is under both a moral and a legal duty to use reasonable pains, care and skill to arrest or diminish the damages which may have been inflicted upon him by the wrong of the defendant, and he can only charge the defendant for such damages as have or would have accrued to him notwithstanding the exercise of such pains, care and skill. *Jenks v. Wilbraham*, 11 Gray, 143; *Bardwell v. Jamaica*, 15 Vt. 438. On like grounds, it is apprehended that a court of equity, which has been called "a court of conscience," will not go to the extreme of enjoining a party in the ordinary transaction of his lawful business, because of a possible injury which may result to the complainant, which injury the plaintiff may ward off at very slight pains and expense. The case of *Rosser v. Randolph*, 7 Port. 238; s. c., 31 Am. Dec. 712, is a distinct authority to the effect, that an injunction will not be granted in such a case. Such a case does not present that "strong and mischievous case of present necessity" (*Attorney General v. Nichol*, 16 Ves. 338; *VanBergen v. VanBergen*, 3 Johns. Ch. 287), which is generally required to invoke this extraordinary aid of a court of equity. I cannot bring my mind to the conclusion, that the *dictum* quoted in the opinion of my associates from *Paddock v. Somes*, 14 S. W. Rep. 749, was intended to impugn this just and salutary principle.

Thirdly, the evidence is even weaker as to any probable danger from *induction*. The plaintiff, in addition to its telegraph line, operates in the city of St. Louis a number of telephone lines. The evidence (including that adduced from the plaintiff) is to the effect, that the inconvenience from induction is greater in the case of *telephone* than in the case of telegraph wires. But the evidence puts it beyond all doubt that no danger of this kind is to be apprehended, either to any telephone wires which the plaintiff may see fit to

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string upon its poles on Locust street, or to any of its telegraph wires connecting with its most delicate instruments. The evidence shows that electric light wires of the character of the defendant's wires are strung in Kansas City for considerable distances on the same poles with telegraph wires, and not more than five feet apart, without any injurious consequences. It also shows that in the city of St. Louis electric light wires like those of the defendant are strung upon the same cross-arm with telephone wires, and but twelve or fourteen inches apart for considerable distances, without producing sufficient induction to substantially impair the use of the telephone wires. A faint murmur of the dynamo is heard in the telephone receiver, but this does not at all obstruct or prevent the hearing of the conversation. The evidence further shows that serious induction does not take place, even where electric light wires are near each other, unless they parallel each other, so to speak, for long distances. In short, the evidence satisfies me that, where the distance of paralleling is but one hundred and twenty-six feet, there is no danger to the plaintiff from induction whatever. Indeed, the evidence indicates that, while there may be and is danger from induction from one telegraph wire to another; there would be, even with close proximity, little danger of induction from an electric light wire to a telegraph wire. The reason is that inductive currents are very slight where the current flows steadily, whereas the condition under which they are most pronounced is that of the current being broken, which takes place constantly in telegraphy; in other words, in what is sometimes called a make-and-break current.

My original impressions upon this branch of the case have been confirmed by reading an opinion of Mr. District Judge (now Mr. Justice) BROWN, in the case of *Cumberland Tel., etc., Co. v. Railroad*, 42 Fed. Rep. 273, in which an attempt was made by a telephone

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company to enjoin an electric railway company from using the earth for its return currents, the ground on which the plaintiff claimed relief being that it was using the ground for its return current, and that a use of the ground by the defendant was causing interference with the plaintiff's currents by induction, or, as it is sometimes called, "conduction." The telephone company, having been prior in time, claimed to be prior in right. But the court took the view that this claim was tantamount to a claim of a monopoly of the earth, and denied the injunction. For much stronger reasons, such relief should be denied here where no danger from atmospheric induction is to be apprehended, and where to grant relief would be to give the plaintiff in a sense a monopoly of the atmosphere.

I am, therefore, clear that the evidence affords no substantial ground for any relief by injunction against the defendant. I think that the judgment should be reversed, and the cause remanded to the circuit court with directions to enter judgment for the defendant.

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LENA WARMINGTON, Respondent, v. THE ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, June 8, 1891.

1. **Railroads**: NEGLIGENCE: CONTRIBUTORY NEGLIGENCE: EVIDENCE. The evidence in this case is reviewed and the case is *held* by SMITH, P. J., to fall within the rule that, after discovering the danger in which the plaintiff had placed himself, even by his own negligence, if the defendant could have avoided the injury by the exercise of reasonable care, the exercise of that care becomes a duty, for the neglect of which the defendant is liable. [ELLISON and GILL, JJ., *dissenting*, the former in a separate opinion.]

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2. **Master and Servant**: NEGLIGENCE OF FELLOWS-ERVANTS. The master is not responsible to those engaged in his employment for injuries suffered by them as the result of the negligence, carelessness or misconduct of other servants in his employ engaged in the same common service, unless the master himself had been in fault; and a brakeman in a switch gang is a fellow-servant with the engineer in charge of the switch engine.

3. ——— : ——— : KNOWLEDGE OF CO-SERVANTS. If a servant discovers that a fellow-servant is careless or incompetent and continues in the employment of his master without protest or complaint, he is deemed to assume the risks of such danger and to waive any claim upon his master for damages in case of injury; and so a brakeman in a switch gang, who knows of the carelessness and incompetency of the engineer in charge of the switch engine, cannot recover for injuries inflicted through the carelessness of the latter.

4. **Trial Practice**: CONTRIBUTORY NEGLIGENCE: PLEADING: DIRECTION OF THE COURT. When the inference of contributory negligence arises from the plaintiff's own testimony, the defendant may take advantage of it regardless of whether such special defense be pleaded or not; and when such contributory negligence is shown as defeats plaintiff's right of action and disproves his case, it is the duty of the court to declare the result to the jury as a matter of law.

Appeal from the Jackson Circuit Court.—HON. J. H. SLOVER, Judge.

REVERSED.

Gardiner Lathrop and *Samuel W. Moore*, for appellant.

(1) The act of voluntarily attempting to board a moving car, going at the rate of six or eight miles per hour, standing on the track between the rails, and attempting to catch the brakerod with the hand and the brakebeam with the foot, as the car comes up, is an act of gross negligence and rashness, such as will prevent a person from recovering from any injury received while engaged in such an attempt. *Gibbons v. Railroad*, 23 N. W. Rep. 644; *Cunningham v. Railroad*, 12 Am. & Eng. R. R. Cases, 217; *Railroad v.*

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Estes, 37 Kan.; *Murray v. Railroad*, 38 Am. & Eng. R. R. Cases, 177; *Sparks v. Railroad*, 31 Mo. App. 111; *Jackson v. Railroad*, 14 S. W. Rep. 54; *Yarnall v. Railroad*, 75 Mo. 575; *Powell v. Railroad*, 76 Mo. 80; *Loeffler v. Railroad*, 96 Mo. 267; *Bolt & Iron Co. Case*, 12 Ill. App. 369; *Railroad v. Simmons*, 11 Bradwell; *Seita v. Railroad*, 82 Mo. 439; *Dowell v. Railroad*, 61 Miss. 519; *O'Neill v. Railroad*, 45 Iowa, 546; *Aleend v. Railroad*, 111 Ill. 202; *Bunt v. Mining Co.*, 24 Fed. Rep. 847; *Railroad v. Stentmeyer*, 92 Penn. St. 276; *Sears v. Railroad*, 53 Ga.; *Kresanowski v. Railroad*, 18 Fed. Rep. 229. (2) Where the evidence offered by plaintiff raises a necessary inference of contributory negligence, the plaintiff cannot recover, although there may be some evidence of negligence on the part of the defendant. *Sparks v. Railroad*, 31 Mo. App. 115; *Powell v. Railroad*, 76 Mo. 83; *Taylor v. Railroad*, 86 Mo. 463. (3) But, even if Madden was negligent in running the train, still there can be no recovery. His unfitness and want of care in the performance of his duties as engineer were not unknown to Warmington. On the contrary they were notorious. Specific acts of negligent conduct on Madden's part had occurred since Warmington became a switchman, and his character and habits had been talked over in Warmington's own crew. With such knowledge of Madden's incompetency, Warmington remained in defendant's employ without complaint and without promise of a change. He thereby assumed all the risks of Madden's negligence, and the plaintiff cannot recover on account thereof. McKinney on Fellow-Servants, sec. 88, p. 199; *McDermott v. Railroad*, 87 Mo. 285; *Harris v. Railroad*, 40 Mo. App. 255; *Davis v. Railroad*, 20 Mich. 105.

Gates & Wallace, for the respondent.

(1) But, even if Warmington had stood between the rails of the track expecting to board a moving car,

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this could not be said to be negligence as a matter of law, under the evidence that this was the usual and customary way among switchmen, and that it was as safe or safer than standing on the side of the track. This testimony was admissible as being evidence of what an ordinarily prudent man would do under like circumstances. *Maxwell v. Eason*, 1 Stewart (Ala.) 514; 32 Minn. 133; *Stephens v. Tuckerman*, 33 N. J. L. 543; *Maury v. Tallmadge*, 2 McClean, 157; *Railroad v. Cowsed*, 57 Tex. 293; *Huhn v. Railroad*, 92 Mo. 440; Clarke's Brown on Usage & Customs, p. 245, note; *Jeffrey v. Railroad*, 56 Iowa, 546; *Coates v. Railroad*, 62 Iowa, 486; Black on Pleadings & Proof in Accident Cases, p. 44; *Barry v. Railroad*, 98 Mo. 62. (2) The question presented is, whether there is any evidence to sustain the verdict. If there is any at all in this case the verdict is not to be disturbed. (3) There is nothing in appellant's point that the reply "admits that the said Wm. R. Warmington was standing between the rails of defendant's track, and that he attempted to get onto the brakebeam of a moving car." The reply expressly denies that he was negligent in so standing, or in so attempting to get on the car.

SMITH, P. J.—This was an action by the plaintiff against the defendant to recover damages for injuries received by plaintiff's husband while in the service of defendant in the capacity of switchman, from which he died. The petition in substance charged that the injury complained of was caused by the negligence and unskilfulness of Madden, engineer, in charge of a switch engine of defendant, while running the same, and that such negligence and unskilfulness was known to defendant and unknown to deceased. The plaintiff had judgment, and defendant appealed. The defendant assails the judgment on the specific ground that the trial court erred in refusing to instruct the jury, that

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under the pleadings and the evidence the verdict should have been for it. The question thus presented must be solved in the light of the evidence.

I. It appears from the record before us that Warmington, the deceased, was one of a crew of five men in the defendant's employment, which consisted of a foreman, engineer, Daniel Madden, a fireman and two brakemen, of the latter Warmington was one. Defendant's switch engine, 219, to which Warmington's crew belonged, was engaged at the time of the injury complained of at work in the defendant's yard in Kansas City under the orders of the yardmaster. On November 30, 1887, the yardmaster ordered the foreman of the crew to get a Gondola car, loaded with lumber, on track 22, and take it to the Hannibal yards. It is rather difficult without the aid of a plat of the defendant's yard, with which we have not been favored, to make clear the relations of the defendant's main tracks to its sidetracks and the several branches of the latter, so that the statement of the movements of the engine on the several tracks just preceding the injury can be fully understood. It may be stated, however, in a general way, that the defendant operates two main lines of its road through its yard, running north and south, which are termed main tracks number 1 and number 2. Diverging from these lines are numerous side lines, one of which, number 6, has a branch which is numbered 22. South of the yard, on main track number 2, is a water tank. Side line number 6 diverges from both main tracks north of the water tank. The point of divergence from main track number 2 is about one hundred and fifty yards north of the water tank. Branch line number 22 diverges from side line number 6 at a point about three hundred yards from where the latter joins the main line number 2. In executing the order of the yardmaster in respect to the movement of the car of lumber, the engine moved along on sidetrack number 6 until it reached the point where side line number 22 is

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joined to it, where it stopped and Warmington got off, threw the switch and let it into the branch, on which it ran until it reached the car which was immediately coupled onto the tender by some of the crew other than Warmington, who had remained at the switch. When the car backed out of the switch on sidetrack number 6, Warmington got aboard of it and rode south until the office of the yardmaster was reached, where he got off. This office is located on number 6 near its intersection with main line number 2. The engine with the car attached moved down on number 2 to the water tank, where it remained about five minutes. It was then after six o'clock in the evening, and dark. At this time Warmington came upon side line number 6, and took his stand at a point distant about the length of the locomotive tender and car, from where number 6 joins main line number 2. Standing there in the middle of the track with his lantern, he signaled the engineer at the water tank to back up. The order of the yardmaster was to back up on the main line to where number 6 diverges, *enter it, then run south on it to main line number 1*, and from thence north on it to the Hannibal yards. The engineer responded to the signal by backing up. There was nothing to obstruct his view. His face was turned that way. He had to stop as soon as he got onto number 6, long enough for the switch to be closed, and to reverse his engine, before he could run south. Warmington was standing with his lantern at a point on number 6 about where the north end of the car should have come to a stop. The engine backed the car up at a rate of speed of about eight miles an hour. Instead of stopping just inside of the switch it went four or five carlengths upon number 6, and two or two and a half carlengths beyond where Warmington was standing when injured.

Warmington could have seen the car all the way as it approached from the water tank to where he stood, while on the other hand the engineer could have seen

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Warmington from the time he left the water tank until almost to the very moment he was struck From the fact that Warmington took his stand in the middle of the track of number 6 at a distance from the switch entrance, equal to about the length of the engine, tender and car, together with the further fact that he knew the engine had to stop as soon as it entered the switch preparatory to moving south on that track, I think the inference is quite plain that he had not contemplated jumping on the car which killed him while it was in motion, but that he expected to get on after it had come to a stop there. If the train had been going further north on number 6, and had not been obliged to stop at that point, then the presence of Warmington at the place where he stood when injured would have raised the inference that he intended to board the passing car. The testimony shows that a man cannot get on the brakebeam of a moving car under favorable conditions when the speed exceeds four miles an hour, and this we should think the engineer was presumed to know. He moved his train at double that rate of speed. The testimony was that even at that rate of speed he could have stopped the engine within four or five feet of the switch entrance. The tendency of all the evidence is to show that Madden, the engineer, was a careless, incompetent and unfit person to act as the engineer of the engine in question at the time Warmington met his death.

But, suppose Warmington did take his position in the middle of the defendant's sidetrack, number 6, upon the erroneous assumption that the train would be stopped as soon as it cleared the switch entrance, and that the end of the car would not come further than where he stood, still, was he not guilty of negligence, which contributed to his injury and death? I think it must be conceded that, by that act, he was guilty of contributory negligence; but, even though he was, ought it to preclude a recovery under the facts of the

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case? Was not the defendant guilty of negligence in running the train. The engineer must have known that Warmington was relying upon the stopping of the train when it passed the switch. He knew, too, that if Warmington intended to jump upon the brakebeam as the car passed, that he could not do so at the rate of speed the train was going. From his position on the engine, he was bound to have seen, and to have become aware of, the peril of Warmington's situation. I think the evidence abundantly shows that the engineer saw, or could have discovered, by the exercise of ordinary care, the danger in which Warmington was, in time to have averted the disaster. This case falls, as I think, within that rule now firmly imbedded in our jurisprudence, which is to the effect that, in cases where plaintiff has been guilty of contributory negligence, the defendant is liable; if, by the exercise of ordinary care, it could have prevented the injury. It is to be understood that the defendant will be liable, if by the exercise of reasonable care, after a discovery by defendant of the danger in which the injured party stood, the injury could have been prevented, or if the defendant failed to discover the danger, through the recklessness of the employes, when the exercise of ordinary care would have discovered the danger, and averted the calamity. Or to state the same rule in another way, that, if, after discovering the danger in which the plaintiff had placed himself, even by his own negligence, the defendant could have avoided the injury by the exercise of reasonable care, the exercise of that care becomes a duty, for the neglect of which the defendant is liable. *White v. Railroad*, 34 Mo. App. 57; *Cogney v. Railroad*, 69 Mo. 423; *Price v. Railroad*, 72 Mo. 414; *Zimmerman v. Railroad*, 71 Mo. 484; *Kelley v. Railroad*, 75 Mo. 138; *Rine v. Railroad*, 88 Mo. 372; *Warner v. Railroad*, 81 Mo. 368; *Donohoe v. Railroad*, 83 Mo. 543; *Yancy v. Railroad*, 93 Mo. 432; *Donohoe v. Railroad*, 356;

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Dunkman v. Railroad, 95 Mo. 232. The remark of the eminent judge who delivered the opinion in *Kelley v. Railroad*, *supra*, "that if the negligence of the company which contributed directly to the cause of the injury occurred after the party injured was, or by the exercise of proper care might have been, discovered on the track by defendant's servants in charge of the train in time to stop and avert the calamity, the railroad is liable, however gross the negligence of the injured party may have been in placing himself in a dangerous position," is applicable here.

In operating a railway train in the absence of any municipal regulation to the contrary, no rate of speed is, of itself, negligence, yet, cases may, and do, arise, where it is necessary to determine whether the act of the railway company complained of is negligent, to take into consideration the rate of speed of the train at that time, together with other facts. *Stepp v. Railroad*, 85 Mo. 229. When a train is run at an unusual rate of speed, it is the duty of those in charge of it to use greater vigilance and care, so as to prevent accidents on the track. Hence, the speed of the train in question becomes a material fact in the determination of the question of defendant's negligence. Knowing, as the engineer presumably did, that, at the rate of speed he was running the train, Warmington could not get on the car while it was in motion, if it was his purpose to do so, with safety, it was the duty of the engineer either to have reduced the speed so that he could, or to have stopped the train if it could be done, as soon as within the switch, and before or by the time it reached the place where Warmington was standing. If the engineer had used either of these precautions after becoming aware of the dangerous situation Warmington was in, as it appears he could, no injury would have happened. He knew the rate of speed he was going—but Warmington did not. He knew that Warmington was on the track and at a place of danger, yet he

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ran his train, after he knew this fact, or might have known it, had he looked in the direction duty required him, "at a rapid jog," much beyond the point, where it was probably his duty to have stopped. His order was to back through the switch onto track number 6, and then run south to the main track. It was wholly unnecessary to have passed the switch even at the rate he was going more than four or five feet, before he could have stopped. His duty was to do this, and then run the other way. Every foot he ran north on this track beyond what was necessary to clear the switch was in disregard of his order. If he had obeyed orders and exercised usual care and skill in operating the engine, the train would not have extended to beyond where Warmington stood, nor would it have run even at such rate of speed by that place and over him. The whole of the engineer's performance was characterized by the most wanton recklessness and flagrant disregard of duty. The conclusion must be that Warmington was guilty of negligence, but that the defendant was likewise guilty of negligence, and that the defendant's engineer either did or could have discovered, by the exercise of ordinary care, the danger in which he was in time to have prevented it, and, so, I would feel bound to hold defendant liable for the injury, were it not for another aspect of the case to which I shall presently advert.

II. The defendant claims exemption from liability to the plaintiff on another and further ground of contributory negligence of the deceased. It contends that though the evidence indubitably establishes the fact that Madden habitually performed the duties of his employment in an incompetent, negligent and reckless manner, and that the reasonable inference to be drawn therefrom is that the defendant knew, or ought to have known, this, and yet, with the knowledge, it continued him in its employment, still that the further inference is equally clear that the deceased knew, or ought to have known, of Madden's incompetency, negligent and

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reckless habits, while discharging the duties of his employment, and, notwithstanding such knowledge, he continued in the employment of defendant without protest or complaint, and so waived any claim upon defendant for damages for the injury he received in consequence of the negligent conduct of Madden.

I am inclined to think that in the opinion expressed after the first hearing of the case, that I did not give this question that full consideration, which subsequent reflection has convinced my mind that it justly deserved. I shall now endeavor to re-examine it in the light of the law and the evidence in the record before us. It is the common-law rule in every state and territory of the Union, and in the federal courts, that a master or employer is not responsible to those engaged in his employment for injuries suffered by them as the result of the negligence, carelessness or misconduct of other servants in his employ engaged in the same common or general service or employment, denominated fellow-servants, or coemployes, unless the employer himself has been in fault. Beach on Cont. Neg., sec. 102. And this rule was long ago established in this state. *Gibson v. Railroad*, 46 Mo. 163; *Gormly v. Iron Works*, 61 Mo. 492; *McDermott v. Railroad*, 30 Mo. 115; *Cumings v. Collins*, 61 Mo. 520; *Smith v. Railroad*, 69 Mo. 32; *Current v. Railroad*, 86 Mo. 62; *Moran v. Brown*, 27 Mo. App. 487.

The principle is that a servant when he engages to serve a master undertakes as between himself and his master to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow-servant whenever he is acting in the discharge of his duty as a servant of him who is common master of both. The responsibility of a master to each of his servants for the competency and fitness of the other servants he employs is analogous to the duty he owes them in regard to machinery. He must take ordinary care and

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reasonable precautions not to employ reckless, dissipated or incompetent servants for positions where their fault may injure their fellow-servants, and if he fail to do this he is liable in case of such injury. If a servant discovers that a fellow-servant is careless or incompetent and continues in the employment of his master without protest or complaint he is deemed to assume the risks of such danger, and to waive any claim upon his master for damages in case of injury. Beach on Cont. Neg., sec. 140; Woods on Master & Servant, sec. 422; *Devitt v. Railroad*, 50 Mo. 302; *Dale v. Railroad*, 63 Mo. 455; *Devlin v. Railroad*, 67 Mo. 545; *Current v. Railroad*, 86 Mo. 63. It is obviously plain from the facts appearing in the preceding statement that the relation which the deceased bore to Madden at the time of the injury was that of co-servant in defendant's employment within the meaning of the rule. Beach on Cont. Neg., sec. 112; *St. Louis Ry. Co. v. Britz*, 72 Ill. 256; *Summerhays v. Railroad*, 2 Col. 284; *Corbett v. Railroad*, 26 Mo. App. 621; *Murray v. Railroad*, 98 Mo. 573.

Turning to the evidence of the plaintiff, and it will be seen that the reputation of Madden for incompetency, carelessness and recklessness was generally known and talked of among deceased's co-servants. The evidence of this fact was all one way, and conclusively establishes it. Unquestionably the inference is that the defendant knew, or ought to have known, this fact and yet continued him in its employment. On the other hand, the deceased must have known this fact, too; for the evidence discloses that it was a matter of common knowledge, or general discussion, among his co-switchmen and the other trainmen of the defendant. There is no evidence that deceased ever made protest or complaint to the defendant of this fact. The burden of showing that he made such complaint to defendant was on the plaintiff, and in the absence of such showing we

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must presume there was no such complaint made. It results from this that the inference of contributory negligence arises from the plaintiff's own testimony. It is well settled when this is so the defendant may take advantage of it, regardless of whether such special defense be pleaded or not. *Milburn v. Railroad*, 86 Mo. 104; *Schlereth v. Railroad*, 96 Mo. 509. And, when such contributory negligence is shown as defeats plaintiff's right of action and disproves his case, it is the duty of the court to declare the result to the jury as a matter of law. *Hudson v. Railroad*, 101 Mo. 13; Rorer on Railroads, 1054, 1055. It must follow from these observations that the plaintiff is not entitled to recover, and that the judgment of the circuit court should be reversed.

My associates do not concur in what is said in the first paragraph of this opinion, but do concur in the second and last. Judge Ellison expresses his views in a separate opinion.

We all agree that the judgment should be reversed which is so ordered.

SEPARATE OPINION.

Ellison, J.—This action is for the death of an employe, and the record clearly shows that the deceased attempted to get upon a moving train by placing himself in the middle of the track and jumping on the end. The pleadings show this, and in order to justify such conduct there was an attempt to show such to be the custom of switchmen. We thus have a case where the deceased deliberately stood in the middle of the track with the intention of taking his chances in jumping or climbing upon the end of a moving train, a misstep or miscalculation meaning certain death. But it is said that the engineer, seeing him upon the track, by making a short stop, could have prevented the accident.

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This will not do, for, as said before, plaintiff's pleadings show that deceased was not wanting the train to stop, as it was his habit to get on while it was moving. It was also further suggested that the train was going faster than usual and ran further onto the switch than it should. To this the answer is that it is evident that no sane man could expect that a train would every time be stopped at exactly the same place, and in this connection it was conceded by counsel that deceased was standing a few feet within the line of where it sometimes did stop. A full examination of this case demonstrates to my mind that no recovery can be justified by any principle of law.

MICHAEL JORDAN *et al.*, Respondents, v. HARRISON & PLATT, also Respondents; MATHIAS ACKERMAN, Appellant.

Kansas City Court of Appeals, June 8, 1891.

1. **Collateral Securities**: ASSIGNMENT OF EQUITY OF REDEMPTION: PURCHASE: INTENTION: EVIDENCE. A pledgor may sell his equity of redemption subject to the lien of the pledgee, and if the transaction shows an intention on the part of the pledgor to make a present and irrevocable transfer of his equity, and assent so to receive it can be inferred on the other side, the transfer will operate in equity as an assignment, if supported by a sufficient consideration; but, if there is anything from which a different intention ought to be inferred, the transaction will not be allowed to have the effect of a transfer. An examination of the facts in this case shows an intention to transfer the note itself in question, and not an equity of redemption therein.

2. **Mistake**: INTEREST PAID TO HOLDER OF FORGED NOTE RECOVERABLE: COLLATERAL SECURITY: COSTS. Plaintiff assumed the payment of a note. The holder pledged the note as collateral to H. & P., and afterwards forged a copy thereof and sold it, with the deed of trust securing it, to A., to whom plaintiff paid interest,

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thinking it the genuine note. On plaintiff's bill of interpleader against H. & P. and A., with other pleadings properly presenting the issues, the trial court properly found, and *held*:—

(1) Plaintiff had paid A. the interest under mutual mistake, by which he was entitled to recover it back.

(2) H. & P. were the owners of the note and deed of trust and A. had no interest therein.

(3) That A. pay the costs.

Appeal from the Jackson Circuit Court.—HON. R. H. FIELD, Judge.

AFFIRMED.

Charles W. Clarke and *Lathrop, Morrow & Fox,* **for appellant.**

(1) The court should have ascertained the balance due Harrison & Platt on their $525 Kirk note; and allowed Ackerman to redeem the Kennedy note upon the payment of the amount so found due. *Ins. Co. v. Tunstall,* 72 Ala. 142; *Johnson Co. v. Bryson,* 27 Mo. App. 349; *Williams v. Ingersoll,* 89 N. Y. 508; *Hutchins v. Simon,* 57 Miss. 628; *Newby v. Hill,* 2 Metc. (Ky.) 530; *Van Blarcom v. Bank,* 37 N. Y. 540; *Railroad v. Iron Co.,* 50 N. H. 57. (2) The Kennedy note was deposited by Kirk with Harrison & Platt as collateral security for his note, and afterwards he sold his interest in said note to Ackerman. The court should have allowed Ackerman to redeem said note upon the payment to Harrison & Platt of the amount Kirk owed them on the loan, for which the said Kennedy note was pledged. Jones on Pledges, sec. 553; *Wilson v. Brumrite,* 21 Mo. 325; *Bender v. Markle,* 37 Mo. App. 234; *O'Neill v. Capelle,* 62 Mo. 202; *Quick v. Turner,* 26 Mo. App. 36; *Bassett v. Glover,* 31 Mo. App. 150; *Wood v. Matthews,* 73 Mo. 477; *Zempleman v. Vieder,* 98 Ill. 613; *Hughes v. Johnson,* 38 Ark. 285; *Dorrill v. Eaton,* 35 Mich. 302; 2 Story, Eq. Jur., sec. 1008; 5 Wait's

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Act. & Def., p. 177. (3) The answer of the defendant Ackerman states a clear case for equitable relief, and the court, having taken jurisdiction of the subject, should have done complete justice. 2 Story, Eq. Jur. 806; Wait's Pr. 168; *Machine Co. v. Gifford*, 66 Barb. 599; R. S., sec. 2099; 2 Story, Eq. Jur., sec. 1526; *Hilton v. City of St. Louis*, 99 Mo. 207. (4) The court erred in rendering judgment against defendant Ackerman for the interest paid by plaintiffs, and for interest on the interest, and for the costs. R. S., sec. 5972.

Teasdale, Ingraham & Cowherd, for Harrison & Platt.

(1) Even if Kirk had a vendible interest in the collateral notes, yet the transaction between Kirk and Ackerman does not amount to an equitable assignment of that interest, for the reason that the record shows no intention whatever on his part to assign that interest, neither does the record show any intention whatever on the part of Ackerman to take that special interest. The intention of the parties must govern. There must have been an intention to transfer not only the remaining interest, but also to transfer Kirk's right to repudiate his contract with Harrison & Platt. If this was not the contract between the parties, the court will not make one for them, and call it an equitable assignment. *Kimball v. Donald*, 20 Mo. 578; *Bank v. Bogy*, 44 Mo. 13; *Ford v. Angelrodt*, 37 Mo. 50; *Bank v. Bogy*, 9 Mo. App. 335; *Christmas v. Russell*, 14 Wall. 84. (2) Even if Kirk had a vendible interest in the collateral notes, and the transaction between him and Mr. Ackerman amounted to an equitable assignment of that interest, yet Ackerman, not having given Harrison & Platt notice of it, must take such assignment subject to all the equities which Harrison & Platt have acquired while dealing with Kirk, and relying upon his ownership of the notes or upon his presumed

waiver of the right of strict foreclosure. *Brasher v. West*, 1 Pet. 616; *Ins. Co. v. Tunstall*, 72 Ala. 149; 2 Story, Eq. Jur. [Redfield's Ed.] sec. 1034, p. 210. This proposition rests upon the maxim that, "He who asks equity must do equity." (3) Appellant's fourth proposition is not well taken. The pleadings as a whole warrant the decree. Money paid by mistake under the circumstances shown by the record can be recovered in equity. Bishop, Pr. Eq. [3 Ed.] sec. 141; Story, Eq. Jur. [12 Ed.] sec. 138. The institution of the suit is sufficient demand under the statute to entitle the plaintiff to recover interest. *Burns v. Bagnal*, 20 Mo. App. 543. Counsel for Ackerman expressly asked at the outset of the case that the costs of the case should be adjudged against the losing party. Kirk could not assign his mere right to question the validity of the contract with Harrison & Platt. *Prosser v. Edmonds*, 1 Younge & Coll. 481; Story's Eq. Juris. [Redfield's Ed.] sec. 1040a.

SMITH, P. J.—The facts disclosed by the record in the case are, that Kirk borrowed of Harrison & Platt $500, and deposited with them certain collateral securities, among others a note for $700 of Kennedy's, which was secured by a deed of trust on certain real property, but which deed was not delivered to Harrison & Platt at the time the collateral was left with them. Afterwards and before the maturity of the Kennedy note, Kirk forged a duplicate copy of it, which he sold and indorsed to Ackerman as the genuine note for its face value, turning over the deed of trust to him at the same time. Kennedy, who was Kirk's grantee, sold the real property to plaintiffs, subject to the Kirk deed of trust. After the plaintiffs' purchase, Kirk informed them that Ackerman was the holder of the Kennedy note, and so they made payments of interest to him amounting to about $84. Harrison & Platt collected on the collaterals in their hands about $300, which they claimed was subject to be diminished by certain

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expenses, such as attorney's fees, commissions, etc. Harrison & Platt caused a sale of the property to be made under the Kennedy deed of trust, and plaintiffs, on learning this fact, brought their suit in equity to have, *first*, the sale set aside; *second*, to require Harrison & Platt and Ackerman to interplead, and assert their claims, respectively, to the note secured by the deed of trust, and, *third*, that they be permitted to pay into court the amount due on the Kennedy note for the benefit of the defendant who should be adjudged entitled to it. Harrison & Platt in their answer consented that the sale of the property under the deed of trust be set aside, and alleged themselves to be the owners of the genuine Kennedy note. Ackerman in his answer claimed to be the owner of the genuine Kennedy note, and alleged that Harrison & Platt held the forged one. The prayer of his answer was, that if the court found that the note he held was the false one, and that held by Harrison & Platt, the true one, then it would allow him to redeem from Harrison & Platt upon payment to them of whatever sum should be found to be due on the note of Kirk to them. The court found and decreed, amongst other things, *first*, that plaintiffs had paid Ackerman $84 under mutual mistake by which they were entitled to recover back the same; *second*, that Harrison & Platt were the owners of the Kennedy note and deed of trust, and that Ackerman had no right, title or interest therein; *third*, that plaintiffs have sixty days to pay Harrison & Platt the amount of the Kennedy note and interest, etc.; *fourth*, that Ackerman pay the costs of the suit.

Ackerman, after an unsuccessful motion to set aside the findings and decree of the court, prosecuted his appeal here.

I. The defendant Ackerman claims that by operation of assignment he became the owner of Kirk's equity of redemption in the Kennedy note, which was held as collateral security by Harrison & Platt under a

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previous agreement made by them with Kirk. This claim is controverted by Harrison & Platt. It becomes, therefore, material to consider the issue thus sharply presented. A pledgor may sell his equity of redemption subject to the lien of the pledgee. Randolph on Com. Paper, sec. 803; *Dupre v. Fall*, 10 Cal. 430; *Nelson v. Edwards*, 40 Barb. 279. The rule in respect to assignments seems to be that, if the transaction shows an intention on the one side to make a present and irrevocable transfer of the subject-matter thereof, and from which an assent to receive it may be inferred on the other side, this will operate in equity as an assignment, if supported by sufficient consideration. This construction, it is said, would generally execute the real intention of the parties, and is adopted for that reason, and, if there is anything from which a different intention ought to be inferred, the transaction will not be allowed to have the effect of a transfer. *Kimball v. Donald*, 20 Mo. 578; *Ford v. Arnholt*, 37 Mo. 50; *Frank v. Bogy*, 44 Mo. 13. Now, applying the principle of this rule to the transaction between Kirk and Ackerman, can we say there was an assignment by the former of his equity of redemption in the Kennedy note to the latter? Was it in their contemplation that this transaction, in respect to the forged note, should vest the equity of redemption in the genuine note in Ackerman? The question here is largely one of intention. Such intention must be mutual and concurrent; for otherwise there would not be that meeting of minds which is essential to the making of the assignment. *Dietz v. Faush*, 53 How. Pr. 217; 1 Parsons on Cont. 6; 4 Kent, Com. 449; *Sturgis v. Croenshield*, 4 Wheaton, 122.

Undoubtedly the inference deducible from the undisputed facts is, that Ackerman intended to purchase the genuine note. Every fact and circumstance of the case clearly negatives the inference that his intention was to acquire by his purchase only the bare

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equity of redemption in the genuine note which Harrison & Platt held as collateral security. It is safe to say that if he had known that the note which he supposed he was buying was spurious, and that the genuine one had already been pledged to Harrison & Platt, that he would have declined to make the purchase. He did not intend by the transaction to acquire so uncertain and precarious an interest even in the genuine note. His manifest intention was to acquire the absolute title to the true note. To contend that he intended to purchase the equity of redemption in the note, it seems to us, is unreasonable and wholly improbable. And, as to Kirk, this was still further from his intention. It, in effect, is conceded that he, with the intention to cheat and defraud Ackerman, designedly, by a false writing and pretense, obtained from him his money. This intention occupied the mind of Kirk to the exclusion of an intention to transfer to Ackerman his equity of redemption in the genuine note. It is plain that neither party, at the time of the transaction, intended that it should relate to or affect the bare equity of redemption in the note described in the deed of trust. The intention of the parties was entirely different and dissimilar. The equity of redemption in the note was not a point upon which their intentions converged. No court would be justified in inferring from the transactions a unity of intention to sell and purchase the equity of redemption in the note. This intention was wholly foreign to the minds of each of the contracting parties. The inference of the intention of the parties can furnish no base for another inference. An inference from one or more inferences is not allowed. It is true that after Ackerman discovered the note he held was a forgery, and that the genuine one was held by Harrison & Platt, that he then, for the first time, interpreted the transaction between Kirk and himself to vest only the equity of redemption in the genuine note in himself. But no such an interpretation appears ever to have been placed on the

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transaction by Kirk. His whole subsequent conduct was entirely consistent with the fraudulent and deceitful intention he manifested in the first instance. We can discover nothing in the transaction between Kirk and Ackerman from which we can infer that it was their intention to merely assign the equity of redemption in the Kennedy note. There being no assignment to Ackerman of the equity of redemption in the note, he can have no *locus standi in judicio* in a court of equity. He certainly has a right of action against Kirk for the criminal fraud perpetrated upon him, but we do not think that he can obtain relief in a court of equity upon the theory contended for by him.

II. No error is perceived in the action of the court in adjudging that the plaintiffs recover of the defendant Ackerman the amount of the interest which they paid under the mistaken notion that he was the holder of the true note. The court having taken jurisdiction of the subject-matter of the controversy between them, it was proper for it to make a complete disposition of the case, adjusting all the equities arising therein. *Butler v. Lawson*, 72 Mo. 242. The abstract of the record does not inform us as to the date of the filing of the replication of the plaintiff, which must be taken as the date of the demand of the plaintiffs for the repayment of the sums of interest paid on the forged note to Ackerman. We must presume, in the absence of such showing, that the amount of the allowance thereon was correct.

Nor do we discover any grounds for revising the action of the court in respect to adjudging the costs. There are many questions discussed in the briefs of counsel, which, in the view of the case we have taken, it becomes unnecessary to notice. The decree must be affirmed. All concur.

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NELLIE E. DAVIS and Her Husband, Respondents, v. THE KANSAS CITY BELT RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, June 8, 1891.

1. **Appellate Practice**: VERDICT: RULES AS TO INTERFERENCE WITH: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY. An appellate court cannot reverse, merely because the verdict is not altogether to its liking. It must defer to the jury in the first place, and then leave to the trial judge to say if the preponderance is so strong against the verdict that it should not stand. It can only interfere when the evidence or the inference therefrom are all against the finding, or there is such overwhelming preponderance against the verdict that it can only be accounted for on the ground of passion, partiality or prejudice. On the facts in this case the question of contributory negligence was properly submitted to the jury, the proof not being so clear and free from conflict that reasonable men, acting impartially, could only determine it in one way, and their finding is conclusive.

2. **Negligence**: CONTRIBUTORY NEGLIGENCE: JURY QUESTION. Though plaintiff heedlessly entered upon the defendant's railroad track in the path of the coming engine, yet there was evidence tending to prove that defendant could, by the exercise of ordinary care, have discovered the impending peril in time to have avoided the injury, which was a question for the jury.

3. ——: ——: PERILOUS SITUATION: INSTRUCTION: HARMLESS ERROR. Under the circumstances and situation of the parties in this case, the being upon the track in front of the engine was necessarily a position of peril; and an instruction in relation thereto and set out in the opinion, though subject to verbal criticism, was merely harmless error.

4. ——: ——: SELF-PRESERVATION: INSTRUCTION: DEFENSE: PLEADING AND PROOF. An instruction declaring the instincts of self-preservation are not proper consideration, in determining whether plaintiff exercised ordinary care, was properly refused in this case because:

   (1) There was plenty of instructions without it, and it was unnecessary in advising the jury as to their verdict. (The practice of asking and giving numerous instructions strongly disapproved.)

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(2) It is a mere abstraction, and clothed in such language as was calculated to mystify the jury.

(3) It does not properly declare the law of this state, where contributory negligence is a matter of defense—must be alleged in the answer and proved to exist by a preponderance of the evidence.

Appeal from the Jackson Circuit Court.—HON. J. H. SLOVER, Judge.

AFFIRMED.

Pratt, Ferry & Hagerman, for appellant.

(1) Upon the undisputed evidence in the case, the court should declare that both plaintiff and her husband were guilty of contributory negligence. *Harlan v. Railroad*, 64 Mo. 480; *Zimmerman v. Railroad*, 71 Mo. 476; *Powell v. Railroad*, 76 Mo. 80; *Kelly v. Railroad*, 88 Mo. 534; *Yancey v. Railroad*, 93 Mo. 433; *Butts v. Railroad*, 98 Mo. 272; *Beyel v. Railroad*, 12 S. E. Rep. (W. Va.) 532, 534. Whenever the physical facts contradict the testimony of a witness, the latter must fall, even at the hands of an appellate court. *Spohn v. Railroad*, 87 Mo. 74; *Hunter v. Railroad*, 116 N. Y. 615; s. c., 23 N. E. Rep. 9. (2) The court erred in giving instruction, numbered 3, for plaintiff, for several reasons. *First.* The accident was simultaneous with the appearance of danger. *Butts v. Railroad*, 98 Mo. 272. *Second.* The instruction gives a right of recovery regardless of contributory negligence, even though the danger was not apparent. *Dahlstrom v. Railroad*, 96 Mo. 99, 104; *Yancey v. Railroad*, 93 Mo. 433; *Butts v. Railroad*, 98 Mo. 272; Beach. Cont. Neg. 394, sec. 1461; *Railroad v. Keough*, 13 Ill. App. 431; *Railroad v. McLaren*, 62 Ind. 566; *Railroad v. Miller*, 25 Mich. 279. And even though there was a mistake of judgment. *Rhing v. Railroad*, 6 N. Y. Supp. 641. (3) The court erred in refusing defendant's instruction 20. Instincts of self-preservation are never proper

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considerations when a party is alive and testifies as to what was done. *Dunlevy v. Railroad*, 66 Ia. 435; s. c., 23 N. W. Rep. 911; *Whitsett v. Railroad*, 67 Iowa, 150; s. c., 25 N. W. Rep. 104; *Reynolds v. Keokuk*, 72 Iowa, 341; s. c., 34 N. W. Rep. 167; *Railroad v. Clark*, 108 Ill. 113, 118; *Gardiner v. Railroad*, 17 Ill. App. 262, 264; *Whitaker v. Morrison*, 1 Flor. 25; s. c., 44 Amer. Dec. 627; *Galpin v. Page*, 18 Wal. 364.

Scarritt & Scarritt, for respondents.

(1) The question as to whether plaintiff was guilty of contributory negligence in this case, as was said by Judge NORTON in *Keim v. Railroad*, 90 Mo. 322, "was for the jury under proper instructions. (2) Instruction 3 given on behalf of the plaintiff is all right. *Frick v. Railroad*, 75 Mo 609; *Kelley v. Railroad*, 75 Mo. 138; *Suttie v. Aloe*, 39 Mo. App. 30; *Kelley v. Railroad*, 101 Mo. 79. (3) The court committed no error in refusing appellant's instruction, numbered 20. *State v. Carter*, 98 Mo. 176; *State v. West*, 95 Mo. 142; *Sidekum v. Railroad*, 93 Mo. 400; *Atkinson v, Dickson*, 96 Mo. 582; *McCoy v. Farmer*, 65 Mo. 247; *Acock v. Acock*, 57 Mo. 154; *Kauffman v. Harrington*, 23 Mo. App. 572. The declaration asked was an abstract principle, a mere platitude, not based upon the evidence, and should not have been given. *Fairgrieve v. City of Moberly*, 29 Mo. App. 141. This instruction was properly refused on the ground that the number asked by appellant was excessive, and was asked not with a view of enlightening the jury, but rather of enhancing the chances of involving the court in minor errors. *Deering v. Collins*, 38 Mo. App. 73; *City of Hannibal v. Richards*, 35 Mo. App. 15; *Norton v. Railroad*, 40 Mo. App. 642. Instructions, though correct in principle, but not revelant to the case, are properly refused. *Kauffman v. Harrington*, 23 Mo. App. 572; *Schroeder v. Mason*, 25 Mo. App. 190.

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In any view of the case, the refusal of this instruction would not justify a reversal of the judgment in this cause.

Gill, J.—Plaintiff recovered a judgment for $2,500 against the defendant in the court below, on account of personal injuries inflicted at the crossing of defendant's railroad on Indiana avenue, Kansas City, and defendant appealed. The charge of negligence made in the petition is, that defendant's servants negligently and carelessly ran a switch engine over the plaintiff and her husband while they were crossing the tracks near the corner of Sixteenth street and Indiana avenue; that there was no bell rung or other warning given of the approach of the engine. In addition to a general denial the defendant set up contributory negligence on the part of plaintiff and her husband in going upon the railroad track at the time.

I. The first point made in defendant's brief is, that the circuit court should have sustained the demurrer to the evidence, because it is claimed a clear case of contributory negligence was made out. We have carefully read and considered the testimony, and discover no reason to condemn the action of the trial court in this regard. The evidence for the plaintiff, if credited by the jury, made a case for her, and the court very properly refused to declare as a matter of law that she could not recover. The substance of the evidence tending to support plaintiff's right to recover may be stated as follows: The plaintiff, Nellie E. Davis, just prior to the injury complained of, was riding south on Indiana avenue in a one-horse buggy which was being driven by her husband. She sat on a bag of oats to the front of the buggy seat, with her face turned towards the southwest. The husband sat on the right-hand side of the seat, and a carpenter by the name of Inger on the left. As they approached the tracks of the defendant company, which were five in number and

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intersected Indiana avenue on grade at nearly a right angle, all three of these persons looked and listened for approaching cars or engines from the time the buggy was at least a half of a block from the tracks until the very instant the collision occurred. When the buggy was somewhere between the distance of sixty and twenty feet from the track on which the injury happened, the horse and buggy were stopped, and all of its occupants looked and listened for approaching cars and signs of danger. Inger says the stop occurred about sixty feet from the railroad track, Mrs. Davis says about forty feet, and the engineer in charge of the engine that caused the injury says that as his engine went west he saw them standing not more than twenty feet from the track. It was impossible to cross defendant's tracks, owing to the condition of the street, except at the extreme western side of Indiana avenue. The engine causing the injury was running on the second track from the north. There were three or more box freight cars standing on the northmost track, upon and across the sidewalk on the west side of the street, and west thereof. In crossing the tracks, it was necessary for plaintiff to go so near the end of these box cars that she could have touched the east one as the vehicle went past. The distance between the track on which these box cars stood and the one on which the engine was being operated (and where the damage occurred) was, according to the testimony of one of the defendant's witnesses, about thirteen feet. Deduct now from this thirteen feet the probable projection of the box cars and it seems doubtful if sufficient space remained to include the length of the horse and buggy back to the seat where the driver sat, so that when the conveyance was driven along by the box car the horse would be onto the second track before the occupants of the vehicle could look around the obstruction and see the approaching engine. And according to plaintiff's evidence they were unable to see the engine (although

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continually on the watch out) until they had passed the box cars and found themselves immediately in front of it. They testify, too, that they stopped and listened, but heard no bell ringing, and that they had no warning whatever of the engine's approach. The evidence, too, tends to prove Mrs. Davis to have been seriously injured by the collision, and there is no just reason to contest the verdict on the ground of excessive amount.

We cannot undertake to set aside all this, and the other evidence on the part of the plaintiff, by a consideration of the photographs and experiments shown at the trial, however plausible they may seem. The photographs do not show, as testified to by Mrs. Davis (and not denied by any other witness), the condition of things as they existed at the date of the accident. They were taken about a year after Mrs. Davis' injury. The testimony, too, of Quest and others was not based upon the condition of things as sworn to by plaintiff and Inger. They (Mrs. Davis and Inger) testified that the box cars, which obstructed their view, sat upon or at the line of the west sidewalk, and further they both agreed that their conveyance was driven along the extreme west side of Indiana avenue and right by the end of the box car, whilst it seems that Quest made his observations from the east side of the street, a difference in position likely of thirty to fifty feet. It is unnecessary to refer to the well-established rule that we should not reverse a case merely for the reason that the verdict is not altogether of our liking. We must defer to the jury in the first place, and then further must leave it to the trial judge to say if the preponderance is so strong against the verdict that it should not stand. We only interfere where the evidence, or the reasonable inferences therefrom, are all against the finding and judgment, or there is such an overwhelming preponderance against the verdict that it can only be accounted for on the ground of passion, partiality or prejudice. There is no such case presented here. The

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trial judge was, in our opinion, entirely justified in submitting the issue of contributory negligence to the jury, and their finding thereon is conclusive upon us. The rule is, that in all such cases "the question must be left to the jury, unless the proof is so clear and free from conflict, that reasonable men, acting impartially, could only determine it in one way." Shearman & Redfield on Neg., sec. 43; *Bueschïng v. Gas Co.*, 73 Mo. 320.

Again, the court rightfully refused a peremptory instruction for defendant, because, admitting plaintiff to have heedlessly and carelessly gone upon the track in the path of the coming engine, there was evidence tending to prove that defendant's servants operating the same could, by the exercise of ordinary care, have discovered the impending peril in time to have avoided the injury. According to the evidence for defendant the switch engine first went west, and in passing Indiana avenue the engineer saw plaintiff and her husband standing with the buggy beside the track facing south waiting to pass over; the engine after passing west halted about fifty feet west of Indiana avenue and thence moved back east, and then struck the buggy. In addition to the fact that the engineer was about crossing this thoroughfare where people so frequently traveled, the engineer had notice of the presence there, at the time, of the plaintiff's conveyance, and the exercise of the least care would have suggested to the engineer a look-out for the conveyance. If Mrs. Davis and her husband drove from behind the standing box cars and onto the second track, when, as contended by defendant, they could have seen the switch engine fifty feet away (where it had come to a stop) then it would seem those operating the engine might too have seen the buggy and occupants, and in ample time to have stopped the engine (or slowed up) so as to have avoided the collision. This is quite satisfactorily shown by the evidence for the defendant. Evidently, the engine was

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moving slowly, and the engineer testifies that it was in such slow motion that when it struck plaintiff's vehicle he stopped said engine within the space of six feet.

II. Following our last observations, it is appropriate here to notice defendant's third assignment of error. Objection is made to the following instruction given at the request of the plaintiff: "Even though you find and believe from the evidence that plaintiff was guilty of negligence in going upon the track of defendant, upon which the injury occurred, at the time and place of the accident, yet, if you further believe from the evidence that the place where such injury happened was a public crossing where the defendant's tracks crossed a public street on grade in Kansas City, and that such crossing was in a populous part of the city and used by the public in traveling back and forth, and that defendant's servants in charge of the locomotive engine complained of saw, or by the exertion of ordinary care might have seen, the plaintiff and her husband *upon the track* in their buggy, in time to stop the said engine and avert the injury, and that such injury was caused by the carelessness and negligence of such servants in not so doing, then you must find for the plaintiff, notwithstanding negligence on her part or on the part of her husband." The italics above are those of defendant's counsel. As to the first objection to this instruction (to-wit, the absence of any evidence to support it), we have already given our views, and think it unnecessary to say more. It is said, however, that the instruction is faulty in telling the jury that it was incumbent on defendant's servants to stop the engine and avert the injury if they saw, or might by ordinary care have seen, the plaintiff and her husband *upon the track* in their buggy in time to stop, etc. It is claimed that before this could be required of defendant's servants there must have been impending *danger* or peril in the presence of the buggy on the track. Whilst in other cases this criticism might have some weight, yet, admitting

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this to be a technical objection ordinarily, it could not possibly be at all harmful in this particular case. Under the circumstances and situation of the parties at the time, being *upon the track* in front of this engine was necessarily a position of peril. Conceding, then, that the instruction could have been more properly worded, the defect is entirely harmless, and furnishes no reason for reversal.

III. Among the numerous instructions offered by the defendant was the following: "20. The instincts of self-preservation are not proper considerations in determining whether Mrs. Davis exercised ordinary care." The refusal of the court to give said instruction is assigned as error. Whether or not this instruction embodies good law, yet its refusal was not reversible error. The defendant offered twenty-one separate declarations of law, sixteen of which the court gave. These, with some three given at the plaintiff's request, and two others of the court's motion, submitted all the issues (and indeed others besides) which by any possibility are included in the limits of this case. This oft-repeated practice of crowding the records of the trial courts with a multitude of unnecessary instructions is a growing evil in the trial of causes in this state. It serves no good purpose, but only goes to embarrass the trial judge; and if any great number of such instructions are given they tend to confuse rather than enlighten the jury. Here, for example, the issues to be determined by the jury were very few, so that two or three instructions to the side would answer every useful purpose. The court then was justified in refusing this, with the other four asked by defendant, because they, one and all, were entirely unnecessary in advising the jury as to their verdict. The instruction, numbered 20, was besides a mere abstraction, and clothed in such language as was calculated to mystify the jury. Furthermore, said instruction does not properly declare the law in this state as we understand it. Although I have

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been unable to find any exact precedent in this state (and have been cited to none), yet when it is remembered that in Missouri in actions of this nature contributory negligence is a defense which must be alleged, and by a preponderance of evidence proved by the defendant, we do not think the rule from Iowa and Illinois, here contended for by defendant's counsel, can apply. In these states it is made incumbent on the plaintiff, as part of his case, to negative contributory negligence and affirmatively establish ordinary care on his part, before calling on the defendant at all. See cases cited in defendant's brief. Also 2 Thompson on Neg., p. 1175, sec. 24; Shear. & Redf. on Neg., sec. 43. But in Missouri the rule is no longer one of question that contributory negligence on the part of the plaintiff is matter in defense,—must be alleged in the answer and proved to exist by a preponderance of evidence. *Hudson v. Railroad*, 101 Mo. 13. The plaintiff is presumed to have been in the exercise of ordinary care, and the basis of this presumption grows out of the well-known disposition of men to avoid injury to themselves. Shear. & Redf. on Neg., sec. 44; *Northern Central Ry. Co. v. State to use of Geis*, 31 Md. 357; *Railroad v. Gladmon*, 15 Wall. 407; Lawson on Pres. Ev. 102. Whether or not then sufficient evidence is produced by defendant to overcome this presumption (founded on the prevailing "instincts of self-preservation," and standing to the credit of the plaintiff) is a question for the jury, and it would, therefore, be erroneous for the court to declare, as here requested, that such presumption was not a proper matter for their consideration.

The remaining point presented relates to certain questions and answers of witnesses Inger and Hereford. Having examined these objections we fail to see any substantial reason for complaint. The case seems to have been fairly tried, and we discover no reason for reversing the judgment; the same is, therefore, affirmed. All concur.

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M. Wolff, Appellant, v. J. W. Coffin, Respondent.

Kansas City Court of Appeals, June 8, 1891.

Justices' Courts: NOTICE OF APPEAL: DUTY OF COURT. When the appeal from the judgment of the justice is taken on a day subsequent to its rendition, and no notice thereof was given ten days before the second term of the appellate court thereafter, then the judgment of the justice shall be affirmed at the election of the appellee. In the absence of such notice and the appearance of the appellee the circuit court has no jurisdiction to enter any other judgment than that of affirmance or dismissal of the appeal.

Appeal from the Jackson Circuit Court.—Hon. James Gibson, Judge.

Reversed and remanded (*with directions*).

F. V. Kander, for appellant.

(1) "If the appeal be not allowed on the same day on which the judgment is rendered, the appellant shall serve the appellee, at least ten days before the first day of the term at which the cause is to be determined, with a notice in writing, stating the fact that an appeal has been taken from the judgment therein specified." R. S. 1889, sec. 6342; R. S. 1879, sec. 3055. (2) The duty to affirm in such case is not discretionary, but mandatory on the court. The question of the sufficiency of the statement filed in the justice's court cannot be inquired into. And the court can render no other or different judgment; it must affirm the judgment of the justice or dismiss the appeal. *Cooksey v. Railroad*, 17 Mo. App. 132, 138, 139; *Davis v. Schields*, 14 Mo. App. 397; *Horton v. Railroad*, 26 Mo. App. 349–358; *Holloman v. Railroad*, 92 Mo. 284.

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Robinson, O'Grady & Harkless, for respondent.

(1) The statement filed before the justice did not constitute a cause of action. *Brashears v. Strock*, 46 Mo. 231; *Butts v. Phelps*, 79 Mo. 302; *Swartz v. Nicholson*, 56 Mo. 508; *Rosenberg v. Boyd*, 14 Mo. App. 429; *Wiese v. Brown*, 29 Mo. App. 521; *Nutter v. Houston*, 42 Mo. 451. (2) Statements before justice of the peace must advise the opposite party of the nature of the claim, and be sufficiently specific to be a bar to another action. *Butts v. Phelps*, 79 Mo. 302; *Hill v. Ore & Steel Co.*, 90 Mo. 106. If the statement did not constitute a cause of action, then there was no valid judgment to affirm in the circuit court, and the court did not err in setting aside the judgment of affirmance of the justice of the peace, and giving the plaintiff until the October term, 1889, to amend his statement. *Hill v. Ore & Steel Co.*, 90 Mo. 103. The plaintiff having declined to amend his statement, the court did not err in dismissing the case.

Gill, J.—This was an action instituted before a justice of the peace. The cause was regularly tried on the evidence before the justice on December 17, 1888, and judgment rendered for plaintiff. On December 27, 1888, the defendants—respondents here—took their appeal to the circuit court. On May 16, 1889, the plaintiff filed his motion in the circuit court to affirm the judgment of the justice, for the reason that "this the April term, 1889, of the circuit is the second term of said court since the said appeal was taken, and that no notice of said appeal was, or has been, given to the plaintiff, and that said appeal was taken after the day on which said judgment was rendered by said justice, and that the plaintiff, appellee, has not entered his appearance in the said circuit court." Which motion to affirm the judgment of the justice was by the circuit court on the first day of June, 1889, sustained. On

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June 29, 1889, the defendants, appellants, appearing for the first time in the circuit court since their appeal, filed their motion to set aside the affirmance of the judgment of the justice by the circuit court for the reason, as in said defendant's motion alleged, "that the statement filed before the said justice does not constitute a cause of action, and the said judgment so rendered is void." Which last motion, to set aside the affirmance of the judgment of the justice by the circuit court, was by said court sustained, and the court of its own motion granted leave to the plaintiff to amend his statement on or before the third day of October term, 1889, of the said court. The plaintiff had entered no appearance, and was not present in the circuit court. On July 13, 1889, plaintiff appeared specially for the purpose, and for that purpose only, and declined to amend his statement and excepted to the order of the court setting aside the affirmance of the judgment of the justice, and on October 15, 1889, again filed his motion asking the court to affirm the judgment of the justice setting out in said motion the same grounds as in his first motion to affirm said judgment, which motion was by the court overruled and duly excepted to. And afterwards on the twenty-fourth day of November, 1890, the cause being called for trial by the court, the plaintiff having heretofore refused to amend his statement, and refused to enter his appearance preferring to stand on his rights, the court dismissed the said cause for want of prosecution. Thereupon, after an ineffectual motion for new trial, plaintiff prosecutes this appeal.

I. The rulings of the lower court were manifestly erroneous. The appeal from the justice was on a day subsequent to the rendition of the judgment. This being so, the appellant should have given the appellee written notice, not later than ten days before the second term of the appellate court after the appeal was taken; and, if the appellant failed so to do, then the judgment of the justice "*shall be affirmed*," if the appellee so

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elect. R. S. 1889, secs. 6342, 6344. The duty to affirm the judgment under such circumstances is mandatory on the circuit court. It has no discretion but to enforce the statute. In the absence of such notice, and the appellee's failure or refusal to enter his appearance to the cause in the appellate court, the circuit court has no jurisdiction to enter any other judgment than that of affirmance or dismissal of appeal at the option of the appellee. Nor can the appellant have any adjudication in the circuit court as to the sufficiency of the statement filed with the justice, unless he duly prosecutes his appeal, and by the notice brings the appellee into the appellate court. The cases following settle this controversy beyond all question: *Cooksey v. Railroad*, 17 Mo. App. 132, and authorities cited; *Horton v. Railroad*, 26 Mo. App. 349-358; *Holloman v. Railroad*, 92 Mo. 284.

The judgment of the circuit court is reversed, and the cause remanded with directions to set aside the order of dismissal and enter a judgment affirming that of the justice of the peace. All concur.

BARNEY OLIN, Respondent, v. FRANK ZEIGLER, Appellant.

Kansas City Court of Appeals, June 8, 1891.

Justices' Courts: JURISDICTION: RECORD MUST SHOW FILING OF CAUSE OF ACTION. The lodging, with the justice, of the paper which is the foundation of the action is a requisite to jurisdiction, and it must by some means be made affirmatively to appear by the record, if not by a docket entry, then by the paper itself being among the original papers in the cause.

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Appeal from the Jackson Circuit Court.—HON. J. H. SLOVER, Judge.

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REVERSED AND REMANDED.

Kander & Blake, for appellant.

(1) The court had no jurisdiction of the subject-matter of the suit, for the reason that there was no instrument sued on, or a statement of the account, or a statement of the facts constituting the cause of action upon which the suit is founded, filed before process was issued in this suit. R. S. 1889, sec. 6138; *Peddicord v. Railroad*, 85 Mo. 160-162; *Pattison v. Lutz*, 1 Mo. App. 133-135; *Barr v. Blomberg*, 37 Mo. App. 605, 608. And plaintiff did not offer to file the basis of his cause of action in the circuit court, but offered it only in evidence at the trial. (2) To constitute the filing of pleadings or papers in a case, the pleading or instrument must be delivered to the court or officer and left with him, and by him lodged in his office. An intending plaintiff cannot, by merely exhibiting a pleading or paper to a court or officer, and then carrying the same away with him, contend that such pleading or paper is filed with such court or officer. *Baker v. Henry*, 63 Mo. 515-517. (3) And the transcript of the record of the justice who issued the process shows no filing of any instrument sued on, account or cause of action. To allow the justice now by his affidavit or otherwise to attach or file an instrument or account, would be to allow him to amend his record after the cause had been taken from him. In this case it would be more than an amendment, it would be permitting him to file *nunc pro tunc* the basis of his jurisdiction after the case had been taken from him and once tried. *Horton v. Railroad*, 21 Mo. App. 147, 148; *Norton v. Porter*, 63 Mo. 345, 346. There is no evidence that the duebill or any other paper or pleading was ever filed. (4) The justice shall, among other entries in his docket, enter "a brief statement of the nature of the plaintiff's demand, and

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the amount or description and value of the property claimed," etc. R. S. 1889, sec. 6131.

I. J. Ringolsky, for respondent.

(1) The circuit court found as a matter of fact that the duebill referred to in the evidence, and in the affidavit of Thomas King, was filed by the respondent at the time this cause was commenced as a foundation for the same, and as the instrument sued on. This finding of the circuit court is conclusive on the appellate court, unless appellant can show from the evidence produced below that the finding of the court in this matter was wrong in point of fact. *Fitzpatrick v. Railroad*, 34 Mo. App. 280-284. (2) If the facts as stated in the affidavit of Thomas King are true, and the duebill, a copy of which is embodied in his affidavit, and which is the same as the duebill introduced in evidence, then the justice and the circuit court both had jurisdiction, for the instrument sued on was "filed" at the time of issuing the attachment; and furthermore the justice must be presumed to have done his duty, and issued the process according to law. If as the court found, the instrument offered in evidence was filed at the time of getting out the attachment, it was considered as filed when in the circuit court, and there was no occasion for filing it a second time. As to what constitutes a filing, see: *Baker v. Henry*, 63 Mo. 517-519; *Bensley v. Haeberle*, 20 Mo. App. 648; *Crubbs v. Cones*, 57 Mo. 83. (3) Even if no instrument was filed at all at the time suit was brought, this would not justify a dismissal because the instrument was tendered to R. H. Mayberry, justice of the peace, as will be seen from his transcript on page 3 of record, before the trial was commenced before him. R. S. 1889, secs. 6139 6242. (4) As to whether this duebill was filed, and was the same instrument which had been filed with the justice at the time the suit was commenced, it was the duty of the

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circuit court to determine, as a preliminary question to the reception of the paper in evidence, and on appeal it must be presumed in support of the action of the circuit court in the absence of evidence to the contrary that the court determined rightly. *Fitzpatrick v. Railroad*, 34 Mo. App. 280-284.

Ellison, J.—This action is founded on a duebill for $100, which is alleged to have been filed with Thomas King, a justice of the peace. The transcript of the justice does not show that the duebill or other statement of a cause of action was filed or lodged with the justice, though it does show that he issued process. A change of venue was taken from Justice King to Justice Mayberry, where defendant moved to dismiss for want of jurisdiction in the justice—no instrument or other foundation of the suit having been filed with King. Whereupon plaintiff asked leave to file a certain duebill as constituting plaintiff's cause of action. This motion was sustained, and plaintiff appealed to the circuit court, where plaintiff had judgment, and defendant brings the case here. In the circuit court objection was made to the following affidavit of Justice King, the objection being overruled:

"Thomas King, being first duly sworn upon his oath, says, that he is the justice of the peace, in and for Kaw township, Jackson county, Missouri; that, on the nineteenth day of December, 1889, Barney Olin, the plaintiff in the above-entitled cause, called at my office and delivered, and I filed with me as the basis of an attachment suit, a duebill, together with an affidavit and bond, which said due bill was for the sum of $100, and is in words and figures as follows: * * * Said duebill so filed with me is hereto attached and made a part hereof; that, at the time the affidavit and attachment bond was given me and signed, the said Barney Olin delivered to me the said duebill, which is now in his possession, or in the possession of his attorney;

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that said duebill was not marked filed by me by oversight and mistake, and that through mistake, inadvertence or oversight the said duebill was carried off by said Barney Olin, and the same was not seen by me again until presented to R. H. Mayberry, a justice of the peace, to whom the above-entitled cause was sent by me, on a change of venue, and to whom the plaintiff's attorney offered this duebill, which was filed with me and asked that the same be made a part of the transcript sent by me to said R. H. Mayberry, and at the time the said duebill was presented to said R. H. Mayberry, I marked the same filed as of former date."

"[Signed] THOMAS KING,
"Justice of the Peace."

A justice of the peace court being an inferior court of limited jurisdiction, the record should affirmatively show such jurisdiction. So, the record here should show the filing of the duebill, which was the foundation of the action. *McQuoid v. Lamb*, 19 Mo. App. 153; *Gideon v. Hughes*, 21 Mo. App. 528. It is not necessary that the instrument should have a filing indorsed thereon, but it should be lodged with the justice whether the filing be indorsed or not. And that it has been lodged with the justice should appear from the record. A statement of the filing or lodging may, perhaps, be omitted from the justice's docket, but, in such case, the paper itself should then necessarily be among the original papers in the cause in order that jurisdiction may affirmatively appear. The lodging of the paper, which is the foundation of the action, is a requisite to jurisdiction, and it must by some means be made to appear by the record. It does not so appear here. No mention is made of it in the transcript of the justice who issued the process, nor was it identified when offered in the justice court where the cause was sent on change of venue. The offer before the second justice is as though it was an original filing with him,

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and not as having been filed with the first justice. It appears from King's affidavit that the plaintiff delivered it to him when he issued the process, but took it off again and kept it, and, so far as the record shows, has it yet. It has not yet been filed or lodged in any court.

We will reverse the judgment and dismiss the cause. All concur.

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WADE DUNCAN, Respondent, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, June 8, 1891.

1. **Negligence:** CONTRIBUTORY NEGLIGENCE: DEMURRER TO THE EVIDENCE: CARELESSNESS AFTER KNOWLEDGE OF PERIL. If without dispute it appears that plaintiff entered upon the railroad track immediately in front of the moving car, so close thereto that even with the greatest care defendant's servants were powerless to avert the injury, then plaintiff's carelessness would preclude his recovery and a demurrer to the evidence should be sustained; but in this case, while defendant's evidence tended to prove this state of facts, yet there was testimony tending to sustain the claim that plaintiff stood upon the track upon which the train was approaching, long enough prior to the accident, and far enough away from the coming train, for those operating the same, by the exercise of ordinary care, to discover his peril in time to have stopped the train before striking the plaintiff, which, if true, will entitle plaintiff to recover, even though he was negligent in entering and stopping upon the track, and, therefore, the demurrer to the evidence was properly overruled.

2. ——— : FLAGMAN: CONTRIBUTORY NEGLIGENCE: INSTRUCTION. The fact that an ordinance requires a railway company to keep a watchman, whose duty it is to warn persons about to cross the tracks of approaching trains, does not absolve such persons from a like duty of ordinary care when crossing such place of danger; they are bound to use their senses, and do all a prudent man, under the circumstances, would do to avoid danger. Where a person approaching such place of danger notes the absence of such watchman,

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sees the moving train by which he is subsequently hurt, and has notice of all the absent watchman could have imparted to him, and voluntarily puts himself in a place of danger, he cannot charge his misfortune to any omission of duty by the watchmen. An instruction set out in the opinion is disapproved.

3. ——— : ——— : COMBINED NEGLIGENCE : PROXIMATE CAUSE. In this case the alleged negligence of the watchman in failing to warn plaintiff of the approaching train was prior in point of time to the negligent acts of plaintiff, and there is no room for the application of the rule, that where plaintiff is put in danger by the combined acts of plaintiff and defendant, and defendant sees, or by ordinary care could see, the peril of the plaintiff in time to avoid the danger, then plaintiff may recover, but plaintiff's negligence in going on the track being the approximate cause, the other rule applies, that to make a defendant liable for an injury, when plaintiff has been also negligent, it should appear that the proximate cause of the injury was the omission of the defendant, after becoming aware of the danger to which plaintiff was exposed.

Appeal from the Jackson Circuit Court.—HON. R. H. FIELD, Judge.

REVERSED AND REMANDED.

H. S. Priest and *H. G. Herbel*, for appellant.

(1) The court erred in overruling defendant's demurrers to the evidence offered at the close of plaintiff's evidence and at the close of the whole evidence. *Rogstad v. Railroad*, 14 Am. & Eng. R. R. Cases, 648; *Taylor v. Railroad*, 86 Mo. 462; *Weber v. Railroad*, 100 Mo. 201; *Harlan v. Railroad*, 64 Mo. 480; *Lenix v. Railroad*, 76 Mo. 91; *Purl v. Railroad*, 72 Mo. 171; *Kelly v. Railroad*, 88 Mo. 514; *Maher v. Railroad*, 64 Mo. 276; *Harlan v. Railroad*, 65 Mo. 25; *Yancey v. Railroad*, 93 Mo. 427; *Rine v. Railroad*, 88 Mo. 398; *Harris v. Railroad*, 40 Mo. App. 264; *Milburn v. Railroad*, 86 Mo. 109; *O'Donnell v. Railroad*, 7 Mo. App. 192; *Boland v. Railroad*, 36 Mo. 492. (2) The court erred in giving the instructions asked by plaintiff. *Railroad v. Aspell*, 23 Pa. St. 147; *Railroad v. Huntley*, 38 Mich. 537; *State, etc., v. Nauert*, 2 Mo. App. 297.

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McDougal & Robinson, for respondent.

(1) In backing its train over an extra hazardous crossing, in a densely populated part of the city, the defendant was bound to exercise extraordinary care—a high degree of vigilance—to prevent accident. *Hutchinson v. Railroad*, 19 Am. & Eng. R. R. Cases (Minn.) note p. 283; *Frick v. Railroad*, 75 Mo. 595, 609; *Donohue v. Railroad*, 83 Mo. 555. (2) The failure of defendant's trainmen to give the statutory signals, as well as the failure of its watchman to notify plaintiff, was negligence *per se*. Plaintiff's injury resulted therefrom, and defendant is liable therefor. *Keim v. Railroad*, 90 Mo. 314, 321, and cases cited; *Kellny v. Railroad*, 101 Mo. 67, 77, and cases cited; *Railroad v. Young*, 37 Am. & Eng. R. R. Cases (Ga.) 489; *Donohue v. Railroad*, 91 Mo. 357, 364. These failures misled plaintiff, and defendant cannot relieve itself from liability simply because he neglected to look or listen. 2 Wood's Railway Law, 1328, and cases cited, note 1. (3) It was defendant's duty in backing its train to use such means to prevent accident as were commensurate with the risk. It was properly left to the jury to say whether, under all the facts and circumstances in proof, defendant should have had a man on the rear car to warn persons on the crossing, and it makes no difference that defendant was not required by positive law to perform this duty. *Guggenheim v. Railroad*, 76 Mich. 150; *Winstanley v. Railroad*, 35 Am. & Eng. R. R. Cases (Wis.) 373, and cases cited; *Loucks v. Railroad*, 31 Minn. 526; *Freeman v. Railroad*, 37 Am. & Eng. R. R. Cases, 501; *Wilkins v. Railroad*, 101 Mo. 93, 106. (4) Even if plaintiff were negligent, yet defendant is still liable if, as the jury found, defendant's servants could and would have seen plaintiff's perilous position, and warned him of his danger, and prevented the accident by the exercise of

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ordinary care upon their part. *Dunkman v. Railroad*, 95 Mo. 232, 344, and cases cited; *Rine v. Railroad*, 100 Mo. 228; *Railroad v. Schuster*, 35 Am. & Eng. R. R. Cases (Ky.) 407. And at such crossings railways are "held to a higher degree of care and vigilance than the traveler thereon." *White v. Railroad*, 34 Mo. App. 57, 78.

GILL, J.—This is an action for damages for personal injuries sustained by plaintiff in being run into by a freight train of the defendant that was backing up and across a public street crossing at the intersection of Mulberry street and St. Louis avenue, Kansas City. At the point of accident these two streets cross at right angles; it was also the crossing of four railroad tracks, running east and west, as also the crossing of a double-track cable railway, running north and south. This crossing is one of those where the city by ordinance provides the railroad company shall keep a watchman to notify all persons about to cross the railroad track of the approach of trains. Plaintiff's evidence tended to prove that on the morning that he was injured he was walking down South Mulberry street, and when he reached the point at which St. Louis avenue intersects said street he saw a passenger train moving on the second track from the north; that there are four tracks on said crossing, the two northernmost belong to the Missouri Pacific Railway Company, and the others to other railways; that before he stepped onto the first and northernmost track he looked in the direction from which the train that struck him came, and saw the car which struck him moving slowly at a distance of thirty feet or more from him; that he supposed said car was moving in the opposite direction, and paid no further attention to it; that he stepped upon the track and stood there awaiting the passage of the passenger train on the next track, until he was struck by the

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moving freight car as aforesaid; that said car, with several others, was attached to an engine which was backing them towards him; that he did not again look in the direction from which said car came after stepping upon the track; that he was struck by said car, which ran over one of his feet, and necessitated the amputation thereof; that he saw no watchman at said crossing, or anywhere near there; that he did not observe any man on the top of the car that struck him; that no warning was given him whatever by anybody of the approach of the train which struck him; that his view of the freight car from the place at which he was standing was unobstructed, and that he could have seen the train if he had looked again in that direction.

Defendant's evidence tended to prove that there was a watchman stationed at said crossing at the time of the accident; that he was on the south side of said crossing, warning persons approaching the track not to get on because of the approach of the passenger train; that the passenger train at the time plaintiff approached and stepped upon the track on which he was injured was between said watchman and plaintiff; that the watchman saw plaintiff stepping on said track, and waived his flag and hallooed to him under the moving passenger train, but plaintiff did not heed said warning, but remained on the track until he was struck by the backing freight train; that the freight car at the time plaintiff stepped upon the track was within a few feet of him and that the view from the point at which the plaintiff was to the freight car was wholly unobstructed; that plaintiff could have seen the car approaching if he had looked in that direction, in time to have avoided his injury; that there was a man stationed on the end of the car furthest from the engine at the time of the accident; that the freight train which struck plaintiff could not have been stopped in a shorter space than about fifteen to thirty feet; that, as soon as the signal to stop was communicated to the engineer, he

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did everything in his power to stop the train, and did stop it within thirty feet, but too late to prevent its striking plaintiff.

The several acts and omissions of the defendant charged as negligence are thus summarized in the petition: "That, by the exercise of ordinary care on the part of the defendant, its agents, servants and employes, he would have been first notified by its watchman of the approach of said freight train; *second*, said freight cars would not have been moved over said street at said crossing at a time when there was not then and there stationed and present a watchman, both as required by said ordinance; *third*, a man would have been stationed on the forward end of said train so backing up over said dangerous crossing to warn him of his peril; and, *fourth*, necessary and proper signals and warnings would have been given of the approach of said train; and if he had been warned in any of the several ways mentioned, by the servants of defendant, whose duty it was at the time and place and under the circumstances alleged, to warn him of his danger, he could and would have stepped off said track before the car struck him and averted the injury, and he further alleges that by the exercise of ordinary care on the part of the defendant's agents and servants in charge of said freight train, they could and would have seen him on said north track in time to have stopped the train and avoid injuring him." The answer was a general denial, coupled with a plea of contributory negligence. The issues were tried by jury, resulting in a verdict and judgment in plaintiff's favor for $1,000, and defendant appealed.

I. Defendant's counsel have argued with much force that the trial court should have sustained a demurrer to the evidence. The ground for this contention is, that, admitting defendant's negligence as charged, yet the manifest contributory negligence of the plaintiff at the time should preclude his recovery. As to this branch of the case, we must hold against the

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defendant. Whilst it is clear that plaintiff heedlessly and carelessly walked onto the track and put himself in a position of danger, yet, as there was some evidence tending to show that, if defendant's employes operating the freight train had been on the watchout, as ordinary prudence would demand, they could have discovered plaintiff standing upon the track, and in a perilous situation, in time to have avoided the disaster. That a railroad company will be liable under such circumstances, notwithstanding the negligent conduct of the plaintiff, is too well settled in this state to require comment. Whatever may be the rule elsewhere, the doctrine has become the law of this state by a long line of decisions. See *White v. Railroad*, 34 Mo. App. 57, where this court in an opinion by SMITH, P. J., reviewed the cases *in extenso*. If without dispute it appeared from the evidence that plaintiff entered upon the railroad track immediately in front of the moving car, so close thereto that even with the greatest care defendant's servants were powerless to avert the injury, then, of course, this element would not belong to the case. And, while defendant's evidence tended to prove this to be the case, yet there was testimony tending to sustain the claim that plaintiff stood upon the track on which the freight train was approaching long enough prior to the accident, and far enough away from the coming train, so that those operating the same might, by the exercise of ordinary care, have discovered plaintiff's peril in time to have stopped the train before striking the plaintiff. And, if this was true, then plaintiff might recover, even though he was negligent in entering and stopping upon the track.

II. At the instance of the plaintiff, and over the objection of the defendant, the trial court gave the following instruction: "The court instructs the jury that the ordinances of Kansas City read in evidence required the defendant to keep a watchman at the crossing where

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plaintiff was injured, whose duty it was to exercise reasonable care in notifying persons about to cross the defendant's railroad tracks at said crossing of the approach of any locomotive, tender or car; and, although the jury may believe from the evidence in the case that the defendant did employ a watchman and station him at said crossing, still, if the jury further believe from the testimony in the case that, by the exercise of reasonable care, said watchman could have seen plaintiff on defendant's track and discovered his danger in time to have warned him of such danger and thereby prevented the accident, and through carelessness and negligence on his part failed to do so, then the verdict will be for the plaintiff, notwithstanding the fact that plaintiff was himself guilty of negligence in being on the track at the time of the accident." In giving this instruction we are of the opinion the court committed serious error. In the first place there was no evidence upon which to predicate such an instruction. The evidence, without contradiction, shows that there was a watchman at the crossing at the time, and that he was in the due performance of his duties. He was on the south side of St. Louis avenue, and south of the passing passenger train, warning persons from approaching from that direction. It was impossible, therefore, for said watchman to be on duty on the north side of the passing train where the plaintiff was. The railroad company was required by a city ordinance to keep a watchman at this crossing with a duty, defined by said ordinance, "*to notify all persons about to cross the railroad track at such crossing of the approach of any locomotive, tender or car.*" It is admitted that there was such flagman there at the time, and it would seem from the evidence he was doing all that reasonably could be expected of him. But, be this as it may, admit for the sake of the discussion that the watchman thus provided by the railroad company was absent from his post or asleep, and did not in any way perform his duty in warning the plaintiff as he

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approached the crossing, still, if the plaintiff heedlessly and negligently walked into danger, placed himself in front of the approaching train, which by the use of his eyes and ears he could have plainly seen and heard, and was run over while in the exercise of such gross carelessness, even then he could not recover, whatever may have been the omission of duty on the part of the flagman. It was the duty of the watchman, it is true, to warn persons about to cross the tracks of approaching trains, yet this did not absolve plaintiff from a like duty of ordinary care when crossing this place of danger. "It will be understood that while a railway company keeps a flagman or maintains a gate or other precautions at a crossing, the traveler is not thereby relieved from all duty to look out for his own safety. He is bound to use his senses, and do all which a prudent man, under the circumstances, would do to avoid the danger.

"No man has a right to depend entirely upon the care and prudence of others; he is bound himself to exercise due care to prevent injury to himself from the lack of the proper caution in others." 2 Wood's Railway Law, pp. 1302, 1314. Hence, it has been repeatedly held in this state, that while the failure to ring the bell or sound the whistle as the train approaches a crossing is negligence *per se* on the part of the railroad company, still if the person injured was himself at the time negligent—did not use his eyes and ears, but went carelessly and heedlessly into danger which he might have avoided by ordinary care—he cannot recover. *Zimmerman v. Railroad*, 71 Mo. 476; *Taylor v. Railroad*, 86 Mo. 462, and cases cited. The facts in the *Harlan case* (64 Mo. 480, and 65 Mo. 22) are very similar to those here. Says Judge NAPTON in the opinion: "A person who goes on a railroad track or proposes to cross it must use his eyes and ears to avoid injury; a neglect of regulations in regard to bell ringing may amount to negligence in law on the part of the railroad employes, but that does not absolve strangers, who propose to

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cross the track, from ordinary care * * * and when crossing one they are expected to be viligant and watchful for the approach of the locomotive. The failure to exercise such vigilance is negligence." The plaintiff in that case (Mrs. Harlan, who sued for the killing of her husband) was not allowed to recover because of the negligence of the husband, notwithstanding the prior negligence of the defendant in failing to give warning of the approach of the engine by sounding the bell or blowing the whistle. And so here this watchman's duty was to give notice of approaching trains. It is of the same nature—performing the same office—as ringing the bell or sounding the whistle. The same rule will apply whether the signal should come from a ringing bell, a sounding whistle or the words of caution from the flagman or the watchman. For other cases in point see *Lenix v. Railroad*, 76 Mo. 86; *Purl v. Railroad*, 72 Mo. 168. The case at bar is even stronger for the defendant in this regard than any of those cited. Wade Duncan, the plaintiff, admits that as he approached the crossing he saw no watchman (he could not likely, for the flagman was on the south side of the passing train, while he was on the opposite side), hence he had notice that he must rely on himself for protection. He saw, too, the moving trains, and was thereby put on his guard. He had notice in fact of all that could have been imparted to him by the watchman, and, having such knowledge, he voluntarily put himself in a place of danger. He cannot, therefore, charge his misfortune to any omission of duty by the watchman.

This branch of the case has no room for the application of the rule, where plaintiff is put in danger by the combined negligent acts of plaintiff and defendant, and defendant sees, or by ordinary care could see, the peril of the plaintiff in time to avoid the danger, then plaintiff may recover. For here the negligence (if any there was) of the watchman in failing to warn plaintiff

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of the approaching train was prior in point of time to the negligent act of the plaintiff. The proximate cause of the injury was not the failure of the watchman to give notice of the moving train, but it was the reckless act of plaintiff himself in placing his person on the track at a time and place when the least caution on his part would have advised him of impending danger. "In order to make a defendant liable for an injury when the plaintiff has also been negligent, or in fault, it should appear that the *proximate cause* of the injury was the omission of the defendant, *after becoming aware of the danger to which the plaintiff was exposed.*" *Zimmerman v. Railroad*, 71 Mo. 484. Now the vice of the instruction in question will be readily observed by assuming (as the jury under the evidence might have found) that plaintiff stepped in the way of the backing train so near thereto that the railroad employes could not have seen him in time to avoid the injury. The jury might, too, in addition have found (as the evidence tended strongly to prove) that when plaintiff approached the crossing he saw this train backing towards him and not more than thirty feet distant, but that he paid no attention to it but recklessly and thoughtlessly placed himself in its way. If such were the facts then surely plaintiff ought not to recover. However, under the instruction heretofore quoted, the jury might still return a verdict for the plaintiff, if they should find that the watchman was remiss in his duty to warn the plaintiff, and this, too, even though plaintiff well knew of the approaching train which committed the damage. Such cannot be the law.

It results, therefore, that the judgment must be reversed and the cause remanded. All concur.

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ALBERT WITASCHECK, Plaintiff in Error, v. WILLIAM GLASS, Defendant in Error.

Kansas City Court of Appeals, June 8, 1891.

1. **Malicious Attachment**: PLEADING : PROBABLE CAUSE : PRESUMPTION. Want of probable cause and malice lie at the foundation of the action for malicious attachment and constitute its fundamental elements and must both concur, and a petition that does not allege the waut of probable cause is fatally insufficient. In the absence of such allegation the presumption is that the attachment plaintiff had reasonable cause to bring his suit.

2. ——— : DAMAGES : EVIDENCE : THEORY OF TRIAL. The admission, over objection, of evidence showing loss and value of time in attending court, money paid for counsel fees, etc., shows that the case was tried on the theory that the action was for malicious attachment, as such damage could only be recovered, where the suit was malicious and without probable cause.

3. **Trespass**: WRONGFUL LEVY OF ATTACHMENT : MEASURE OF DAMAGES. Where the attachment plaintiff under his writ wrongfully levies on the property of a third person, the measure of damages would be the interest on the value of the goods during the time the owner was deprived of them, unless it appears that injury or deterioration has resulted.

4. **Appellate Practice**: NEW THEORY ON APPEAL. A party must stand or fall in the appellate court on the theory upon which he tried his case in the court below.

5. **Definitions**: MALICE. Malice means that the wrongdoer not only intended to do the act which is ascertained to be wrongful, but that he knew it was wrongful when he did it.

6. **Attachment**: PROBABLE CAUSE : DAMAGES. If a creditor has probable cause to believe himself wronged by his debtor's transfer of his property, he has the right given by law to bring his suit to have the matter judicially determined, subject only, if his claim is adjudged false, to pay the costs of suit and such other damages as are allowed by law when property has been wrongfully seized and detained under the process of attachment.

7. **Judicial Notice**: LAW OF KANSAS : COMMON LAW : LAW OF MISSOURI : DAMAGES IN ATTACHMENT. The statute of Kansas not being in evidence, the court cannot take judicial notice of it, and, as the

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court cannot indulge the presumption that the common law prevails there, it is concluded that the rule of law allowing damages in this case must be found in the laws of this state.

8. **Attachment:** EVIDENCE: MALICE AND OPPRESSION. A review of the evidence shows that the attachment case was commenced and prosecuted in the utmost good faith and with no circumstance of malice, oppression or wantonness in its conduct.

Appeal from the Jackson Circuit Court.—HON. J. H. SLOVER, Judge.

AFFIRMED.

R. O. Boggess, for plaintiff in error.

(1) The undisputed facts are, *first*, that the attachment was against Charles Witascheck, and was levied on the property of Albert Witascheck, and, *second*, that the suit was prosecuted for two months, and then decided in favor of plaintiff in this case. These amount to a demonstration that the attachment was wrongfully levied, and the suit was maliciously, oppressively prosecuted. This proposition, with the result of the suit, needs neither authority nor argument for its support. If the same is untrue in logic or reason, then no argument is wanted for its refutation. (2) If the analysis of the petition, contained in the statement, is fair, true and correct, then the court misconstrued the same and erred in giving the instruction quoted, in the nature of a demurrer to the evidence. (3) The theory of plaintiff's case was, and is, that defendant wrongfully caused the attachment to be levied on the plaintiff's property in a suit, wherein he was neither defendant, or alleged debtor, and that the same was, therefore, malicious. (4) It was right and proper in this case to charge malice, wilfulness, wrong and oppression, in order to recover vindictive or exemplary damages; without such charge in the petition such damages could not have been recovered. So the whole case is resolved into the single proposition: "Did the defendant wrongfully

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levy by attachment against Charles Witascheck on the property of Albert Witascheck?" (5) If the last proposition is right and proper then the theory of the defendant and the instruction of the court were wrong, and the nonsuit ought to be set aside. (6) The following authorities support the foregoing propositions, and upon them the plaintiff in error confidently expects a reversal of the judgment of the court below: *State ex rel. v. Moore*, 19 Mo. 369; Freeman on Executions, sec. 254; 20 Cent. L. J. 27; Drake on Attachment, secs. 33, 196, *et seq.; Newman v. Railroad*, 2 Mo. App. 402; *Buckley v. Knapp*, 48 Mo. 152-62; *Cottrell v. Russell*, 21 Mo. App. 1; *Stevins v. Dennis*, 23 Mo. App. 375; *Walser v. Theis*, 56 Mo. 89.

Gage, Ladd & Small, for defendant in error.

(1) According to the petition, this is an action for the malicious institution and prosecution of a civil suit by attachment. The petition contained no allegation of want of probable cause. This is indispensable. *Moody v. Deutsch*, 85 Mo. 237; *Scovill v. Glasner*, 79 Mo. 449; *Stewart v. Sonneborn*, 98 U. S. 192. (2) In the case of an unlawful seizure of personal property, the measure of damages is the value of the property at the time of the seizure, with interest thereon to the date of the assessment. If after the seizure the property is returned to the plaintiff his measure of damages is (if there has been no depreciation in the value) interest on the value from the time of seizure to the date of its return. *State to use v. Bacon*, 24 Mo. App. 403; *Walker v. Borland*, 21 Mo. 289; *State v. Smith*, 31 Mo. 566. (3) There was no evidence of malice or circumstance of oppression in the case. Therefore, the instruction complained of was properly given. *Alexander v. Harrison*, 38 Mo. 265; *Stewart v. Sonneborn*, *supra*. (4) The plaintiff cannot now claim that the evidence showed that he was at least entitled to interest on the value of the property for the period during which it

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was detained from him, and that, therefore, the case should have been submitted to the jury. This was not the theory upon which he tried his case below, and he will not be permitted to submit it upon a new one here. *McKinney v. Guhman*, 38 Mo. App. 344; *Martinowski v. Hannibal*, 35 Mo. App. 70; *Wright v. Sanderson*, 20 Mo. App. 534; *Nance v. Metcalf*, 19 Mo. App. 183; *Oberbeck v. Sportsman's Ass'n*, 17 Mo. App. 310; *Burton v. Railroad*, 33 Minn. 193.

SMITH, P. J.—The petition alleged that, "the defendant maliciously, wrongfully and oppressively instituted a suit against Charles Witascheck * * * by attachment and sued out a writ of attachment therein, maliciously and wrongfully, and by means of said writ of attachment, maliciously, wrongfully and oppressively caused and procured" the goods of plaintiff to be taken out of and withheld from his possession for about sixty days, by reason whereof the same greatly depreciated in value; and that he necessarily incurred heavy expense, and paid out large sums of money in and about defending said suit, and regaining the possession of his property, etc. There was a trial, and, at the conclusion of the evidence adduced by plaintiff, the court gave an instruction which declared that upon the pleadings and evidence the plaintiff was not entitled to recover. There was a judgment of non-suit and an appeal by plaintiff.

I. The principal question which we are required to consider is, whether the petition states facts sufficient to constitute a cause of action. Want of probable cause and malice lie at the foundation of the action for malicious attachment, and constitute its fundamental elements. Malice, either express or implied, and the want of probable cause must both concur. The petition does not allege one of these constitutive elements, that of want of probable cause. This is a defect which is fatal to its sufficiency. *Moody v. Deutsch*, 85 Mo. 237; *Walser v. Theis*, 56 Mo. 89; *Scovill v. Glasner*, 79

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Mo. 449; *Stewart v. Sonneborn*, 98 Mo. 192; Drake on Attachment, sec. 732.

The bill of exceptions recites that the defendant objected to the introduction by the plaintiff of testimony tending to show the time spent by him in attending the various suits, the value of that time, the amount of money paid out for counsel fees, and for rent of store, etc., upon the ground that such items constitute no element of damage in the case, and that the court admitted the same under the charge in the petition that the prosecution of the Kansas suit was malicious. This very manifestly shows that the case was tried upon the theory that the cause of action stated in the petition was that of malicious attachment. And this conclusion finds further support in the fact that evidence adduced to prove the kind of damages alleged in the petition would not have been admissible upon any other view of the petition. Such damages could only be recovered in a case when the suit was malicious and without probable cause. *Walser v. Theis, supra; Gregory v. Chambers*, 78 Mo. 294; *Mix v. Kepner*, 81 Mo. 96; *Cottrell v. Russell*, 21 Mo. App. 1; Sutherland on Damages, 496; Sedgwick on Meas. Dam. [7 Ed.] 186.

The very learned and able counsel for the plaintiff, in his brief, contends that the whole case is resolved into a single proposition: "Did the defendant wrongfully levy by attachment against the property of Charles Witascheck, on the property of the plaintiff?" As we have already stated, the case was tried upon an entirely different theory. The measure of the plaintiff's damages upon this theory would have been confined to the interest on the value of the goods during the time he was deprived of the use of them, unless it had appeared that injury or deterioration had resulted. *Reno v. Kingsbury*, 39 Mo. App. 240; *State v. Smith*, 31 Mo. 566; *Walker v. Boland*, 21 Mo. 289; *Watson v. Hannon*, 85 Mo. 447; Suth. on Dam., pp. 538 546.

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The plaintiff introduced no evidence to support any such theory of his petition as this. The assumption upon which the plaintiff tried his case in the court below is, as we think, different from that which he has urged here. He must stand or fall in this court upon the theory upon which he tried his case in the court below. *Martinowsky v. Hannibal*, 35 Mo. App. 70; *Fell v. Mining Co.*, 23 Mo. App. 216; *Holmes v. Braidwood*, 82 Mo. 610; *Whetstone v. Shaw*, 70 Mo. 575; *Walker v. Owen*, 79 Mo. 563.

Though the petition does not allege that the invasion of the plaintiff's rights of property was without probable cause, yet, if it be conceded that enough is alleged to show that the elements of malice and oppression mingled in the wrongful act, is there any evidence in the record which entitled the plaintiff to go to the jury on that theory? Under the allegations of the petition, we must assume that the defendant had reasonable cause to bring his suit by attachment, and to cause the writ to be levied upon the property claimed by plaintiff. Malice may be inferred from want of probable cause, but it is neither alleged nor established by evidence. There is not the slightest evidence adduced to show that the ingredient of wantonness or bad motive entered into the act of alleged trespass. These ingredients, in actions of this nature, in order to justify exemplary damages, must characterize the trespass. There need not be any personal ill-will, or spite, towards the injured party, for wantonness or reckless, lawless spirit may be displayed against the property of a stranger. Malice means that the wrongdoer not only intended to do the act which is ascertained to be wrongful, but that he knew it was wrongful when he did it. *Trauerman v. Lippincott*, 39 Mo. App. 481; *Goetz v. Ambs*, 27 Mo. 28; *Eagle v. Jones*, 51 Mo. 316; *Franz v. Hilderbrand*, 45 Mo. 721; *Seibel v. Simeon*, 72 Mo 526; *Bruce v. Ulery*, 79 Mo. 322; *Brown v. Railroad* 89 Mo. 152.

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In this case it is not disputed, that the plaintiff had a just claim against Charles Witascheck. The defendant, supposing himself wronged by the action of Charles Witascheck in transferring the property to his brother Albert, had the right to bring his suit by attachment to test the legality of the transfer. The law gives this right, and protects it in an action brought for malicious prosecution. If the defendant has brought himself within the category of right to sue, given by law, then it is clear that he can avail himself of the indulgence allowed by law of showing probable cause for the suit, but, as we have already indicated, the theory of the plaintiff's case is that the defendant had probable cause to believe that the transfer of the property was fraudulent and void, and hence he had the right by law to bring his suit to have that matter judicially determined, subject only, if his claim was adjudged false, to pay the costs of suit and only such other damages as are allowed by law when property has been wrongfully seized and detained under the process of attachment.

If this were not so it would deter men from approaching the courts of justice for relief. The right to complain of, or sue, another, is given by the law whenever there is probable cause to believe there is ground for the action. *Stewart v. Sonneborn*, 98 U. S. *supra*.

Since the statute of the state of Kansas is not in evidence before us, and as we cannot take judicial notice of it, and as the state of Kansas is not one of those states in which we are authorized to indulge the presumption that the common law prevails, we, hence, conclude that the rule of law allowing damages in such case, must be found in the law of this state. *Flato v. Mulhall*, 72 Mo. 532; *Goldsall v. Bark*, 80 Mo. 631; *Kollock v. Emmert*, 43 Mo. App. 566.

If it be not denied, as is the case here, that the levy of the attachment was with probable cause, but

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contended that it was malicious and oppressive, we are unable to discover from any evidence in the case that this contention can be sustained. There seems to have been nothing in the case to justify it. The suit was commenced and prosecuted, as far as we can discover, in the utmost good faith. No circumstance of malice, oppression or wantonness in the conduct of the attachment case has been called to our attention. There are some other questions discussed in the briefs of counsel, which, in view of the case which we have taken, it becomes unnecessary to notice. It results from these observations that the action of the circuit court in instructing the jury that the plaintiff was not entitled to recover, was not error, and that the judgment must be affirmed. All concur.

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SAMUEL M. C. SAUNDERS, Respondent, v. ROBERT McCLINTOCK, Appellant.

Kansas City Court of Appeals, June 8, 1891.

1. **Contract:** INCUMBRANCER'S RIGHT OF ACTION ON ASSUMPTION BY GRANTEE IN DEED. Where a purchaser accepts and holds a conveyance of real estate wherein it is recited that he assumes and agrees to pay an incumbrance thereon, he thereby subjects himself. to a liability to holder thereof which may be enforced by a personal action.

2. **Deceit:** FALSE REPRESENTATION NOT THE ONLY CAUSE OF ACTION: INSTRUCTION. It is sufficient that the false representation constitute one of a number of material moving causes to the injured party's action, and where two causes or inducements are operative in producing action, one emanating from fraudulent misrepresentations, the other from an independent source, a case of deceit is made out. And an instruction that the misrepresentations must have been the ground on which a transaction took place is error.

8. ——— : REPRESENTATION RELATING TO THE FUTURE: DEFENSE. Representations having reference merely to the future, however much relied upon, constitute no ground of action or defense.

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4. ——: FRAUD OF GRANTOR IN SECURING GRANTEE'S ASSUMPTION OF INCUMBRANCE: DEFENSE. The grantee in a deed conveying real estate containing a clause, that he assumes certain notes against the land as part of the consideration, can set up fraud by his grantor in procuring his acceptance of the deed, in a suit on the implied covenant by the holder of the notes at the time the deed was accepted, he being no party to, and having no knowledge of, the fraud. (*Fitzgerald v. Barker*, 96 Mo. 661, *distinguished.*)

Appeal from the Jackson Circuit Court.—HON. JAS. GIBSON, Judge.

REVERSED AND REMANDED.

Statement of the case:—

This was an action by the plaintiff to recover from defendant by virtue of a covenant in the deed from one Michael F. Marks to the defendant, whereby the defendant was made to assume and agree to pay a part of a certain deed of trust on said real estate which said incumbrance at the time was held and owned by the plaintiff. The petition was in proper form to declare on that covenant, and the defendant's answer was as follows:

"Defendant for amended answer in the above entitled cause states: *First.* That he denies each and every allegation in said petition contained. *Second.* And, for a second and further defense, that between the eighth and sixteenth days of July, 1887, one Frank Bauerlein, who was the agent and representative of the then owner of the property described in the petition, for the purpose of inducing this defendant to purchase an interest in said property, falsely and fraudulently represented to this defendant that a syndicate to purchase said property had been formed consisting of one Charles S. Crysler, John J. O'Brien, ——— Monroe, Daniel E. Saighman and the said Frank Bauerlein, the said Charles S. Crysler having agreed to purchase a one-sixth interest in said real estate, the said John J.

O'Brien a one-sixth, the said ——— Monroe a one-sixth, the said Daniel E. Saighman a one-sixth and the said Frank Bauerlein a one-sixth, and that if this defendant would purchase the remaining one-sixth the syndicate would be complete. And the said Frank Bauerlein further represented to this defendant that said Crysler, O'Brien, Monroe and said Saighman were each and all solvent, and were amply able to pay for their respective shares of said land, the purchase price being $33,000 or $5,600 for each one-sixth, the amount to be made up in part cash and in part by the assuming of certain incumbrances on said property, and that all of the said parties were going into said syndicate on the same equal footing. And this defendant further states that the said representations of said Bauerlein were false and fraudulent; that the said John J. O'Brien and Charles S. Crysler were in fact the owners of said real estate, although the same stood for awhile in the name of Cornell Crysler, and was on said sixteenth day of July, 1887, by said Cornell Crysler, put in the name of one Michael F. Marks for the purpose of concealing the true ownership of said property, and this defendant further states that he was thereafter told by said Bauerlein that he could secure for this defendant an additional one-twelfth interest in said syndicate, and this defendant relying on the truth of said representations agreed to and did take said additional one-twelfth.

"And this defendant further states that neither the said Charles S. Crysler nor the said John J. O'Brien ever became a part of said syndicate, and that said syndicate was not in fact complete as was represented to this defendant when he consented to purchase an interest in said real estate. And this defendant further says that he relied upon the said false and fraudulent representations that the said Crysler and O'Brien were to become a part of said syndicate on the same equal footing with this defendant, and that the syndicate had

been in fact completed as aforesaid in making the purchase of said three-twelfths and in accepting the deeds referred to in the petition. Wherefore, this defendant says that he ought not to be held on the provisions of said deeds whereby he was made to assume the payment of the notes referred to in the petition, or any part thereof, and that the said provisions are, as to this defendant, absolutely null and void.

"And this defendant further states that the plaintiff sold said land on the eighth day of July, 1887, and conveyed the same to said Cornell Crysler, taking back a deed of trust securing the two notes for $6,875, referred to in the petition; and that said deed of trust has been foreclosed and the plaintiff became the purchaser of this property on the twenty-fourth day of October, 1888, at and for the price and sum of $4,000. Wherefore, this defendant says that by reason of the premises the plaintiff ought not to recover, and having answered prays to be hence dismissed with his costs," etc. The reply was a general denial of each and every allegation contained in the answer.

At the trial the plaintiff introduced the following evidence: *First.* A warranty of deed from the plaintiff to Cornell Crysler, conveying certain real estate in Jackson county, Missouri, for $20,625. *Second.* A deed of trust back from Cornell Crysler to John A. Sea, trustee, to secure part of the purchase price to Samuel M. C. Saunders, being the deed of trust alleged in the petition to have been partly assumed as aforesaid and dated July 8, 1887. *Third.* A warranty deed from Cornell Crysler to Michael F. Marks, in which Michael F. Marks was made to assume and agree to pay the aforesaid deed of trust. *Fourth.* Warranty deed from Michael F. Marks to the defendant, Robert McClintock, conveying said real estate, and which contained the covenant declared on in the petition, whereby the said defendant assumed and agreed to pay a part of the said deed of trust from Cornell Crysler to

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John A. Sea, trustee for the plaintiff, said deed dated July 16, 1887. *Fifth.* It was admitted that the Cornell Crysler deed of trust had been foreclosed, and the property bought in by the plaintiff, and the proceeds of the sale properly credited on the notes therein described, and that the balance of said notes were owned by the plaintiff and remained unpaid. Defendant then introduced evidence tending in the main to prove the allegations contained in his answer. Some other facts will be alluded to in the opinion. The issues, under instructions from the court, were submitted to the decision of a jury, who found for the plaintiff in the sum of $2,437.50, and from the judgment thereon defendant appealed.

Karnes, Holmes & Krauthoff, for appellant.

(1) Plaintiff's second instruction was erroneous and very misleading. *Scott v. Haynes*, 12 Mo. App. 596; *Mathews v. Bliss*, 22 Pick. 48, 53; *Safford v. Grant*, 120 Mass. 20, 25; *James v. Hodsden*, 47 Vt. 127, 137; *Carvill v. Jacks*, 43 Ark. 454, 462: *Fishback v. Miller*, 15 Nev. 428, 442; *Cabot v. Christie*, 42 Vt. 121, 124; *Hale v. Philbrick*, 47 Ia. 217, 221; *Spaulding v. Knight*, 116 Mass. 148, 154; *Powell v. Adams*, 98 Mo. 598, 604; 1 Bigelow on Fraud, 497, 543-4, 545; Grinnell on Deceit, sec. 48; *Griffith v. Hanks*, 46 Texas, 217; *Bowers v. Thomas*, 62 Wis. 480, 442; *Albert v. Besel*, 88 Mo. 150, 153; *Clarke v. Kitchen*, 52 Mo. 316; *State v. Chyo Chiagk*, 92 Mo. 395, 416-17; 1 Bigelow on Fraud, 540, 541; *Armstrong v. Winfrey*, 61 Mo. 354, 359. (2) The plaintiff's third instruction should not not have been given. *Harty v. Railroad*, 95 Mo. 368. (3) The verdict was without evidence to support it, and is contrary to the law and evidence and instructions of the court. (4) Respondent does not occupy the position of *bona fide* purchaser for value without notice, etc., as claimed. *Heim v. Vogel*, 69 Mo. 529, 535; *Fitzgerald*

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v. Barker, 4 Mo. App. 105; s. c., 70 Mo. 685; *Flag v. Munger*, 9 N. Y. 483, 501; *Judson v. Dada*, 79 N. Y. 373, 379; *Bull v. Titsworth*, 29 N. J. Eq. 73; *Parker v. Jenks*, 36 N. J. Eq. 398; *Benedict v. Hunt*, 32 Iowa, 27, 30, 31; *Dunning v. Leavitt*, 85 N. Y. 30. That fraud may be shown to relieve grantee. *Fuller v. Lamar*, 53 Iowa, 477, 480; *State v. Citizens' Bank*, 33 La. Ann. 705, 708; *Muhling v. Fiske*, 131 Mass. 110, 113; *Crowe v. Lewin*, 95 N. Y. 423, 427; *Institute v. Sheridan*, 30 N. J. Eq. 23; *O'Neill v. Clark*, 33 N. J. Eq. 444, 446.

John A. Sea and *Gates & Wallace*, for respondent.

(1) Where a purchaser accepts and holds under a conveyance containing a clause which recites that he has assumed and agrees to pay a note secured by a subsisting mortgage or deed of trust on the land, he thereby subjects himself to a liability which the holder of the note may enforce by personal action. *Fitzgerald v. Barker*, 70 Mo. 685; s. c., 13 Mo. 195; s. c., 85 Mo. 13; s. c., 96 Mo. 661. Even though the grantor should not be liable to pay said mortgage. *Deane v. Walker*, 107 Ill. 540. (2) Before the defendant can charge the plaintiff with the fraud alleged in this case, it must appear that he was a party to the fraud. *State to use v. Adler*, 97 Mo. 413, 418; *Crow v. Beardsley*, 68 Mo. 435; *Byrne v. Becker*, 42 Mo. 269; *Fitzgerald v. Barker*, 96 Mo. 661; *State ex rel. v. Hewitt*, 72 Mo. 603; *Brackett v. Griswold*, 112 N. Y. 454; *Irvine v. Bank*, 2 Watts & S. (Pa.) 190; *Wingate v. King*, 23 Me. 35. The plaintiff stands in the position of a *bona fide* purchaser for value without notice, and must recover. *Windland v. Coonce*, 5 Mo. 296; *Howe v. Waysman*, 12 Mo. 169; *Gordon v. Ritenour*, 87 Mo. 61; *Craig v. Zimmerman*, 87 Mo. 475; *Bray v. Campbell*, 28 Mo. App. 519. (3) The second instruction complained of stated the law correctly. It is not open to the objection that it requires the jury to find that the fraud was the sole motive. In the words of the instruction, it is not enough that the

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fraudulent misrepresentation may have remotely contributed to the defendant's action. *Powell v. Adams*, 93 Mo. 598–604; 5 Am. Ency. Law, p. 335. Or supplied a motive to enter into it. Kerr on Fraud & Mistake, 84; *Adams v. Schiffer*, 11 Col. 15; 5 Col. 324. The representation must have been the ground on which the transaction took place. 5 Am. Ency. Law, p. 335; *Rutherford v. Williams*, 42 Mo. 18–24; 2 Pom. Eq, [1 Ed.] sec. 890, p. 374; Bigelow on Fraud, ch. 5, p. 540; *Bryan v. Hitchcock*, 43 Mo. 527. And injury must have resulted to the defendant therefrom. *Smith v. Dye*, 88 Mo. 581; s. c., 15 Mo. App. 585; *Hamilton v. Mallet*, 8 Mo. App. 581; *McBelle v. Craddock*, 28 Mo. App. 380; *Bigby v. Powell*, 25 Ga. 244; *Freeman v. McDaniel*, 23 Ga. 354; *Hawson v. Edgerly*, 29 N. H. 343; *Nye v. Merriam*, 35 Vt. 438; *Bayard v. Holmes*, 34 N. J. L. 296. (4) But even if there were error in this second instruction, on the whole, the instructions given were more favorable than defendant had a right to ask, and the verdict was the only party it could have been given for. In such a case this court will not disturb the finding, as the error is harmless. *Fitzgerald v. Barker*, 96 Mo. 661.

Gill, J.—It will be seen from the foregoing statement of the case that Saunders, on July 8, 1887, sold and conveyed certain land to Cornell Crysler; that a portion only of the purchase money was paid, the balance thereof being evidenced by promissory notes secured by a deed of trust on the property; that subsequently Cornell Crysler conveyed the said land to one Marks, who, on July 16, 1887, made a deed for the three-twelfths thereof to defendant McClintock, and that in said deed it was provided that McClintock should pay the three-twelfths of said incumbrance made by said Cornell Crysler for the benefit of Saunders; that said deed of trust was subsequently foreclosed, the property sold, but not in amount sufficient to pay the

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notes thus secured, and thereupon plaintiff instituted this suit to recover of defendant the three-twelfths of said balance due, resting his action on the assumption by defendant in his deed from Marks.

I. It is no longer an open question, that where a purchaser accepts and holds a conveyance of real estate wherein it is recited that said purchaser assumes and agrees to pay an incumbrance thereon, he thereby subjects himself to a liability to the holder thereof which may be enforced by a personal action. *Fitzgerald v. Barker*, 4 Mo. App. 105; 13 Mo. App. 192; 70 Mo. 685; 85 Mo. 13; 96 Mo. 661. It must be admitted, then, that plaintiff's evidence, without more, made a clear case for the plaintiff. So, then, what we have to consider here is, as to the manner and matter of defense. Did the court err in the manner of submission thereof to the jury, and did such matter constitute a defense as to the claim of this plaintiff?

II. Relating to the manner of submitting the defense of fraud which was pleaded by defendant in his answer, the court, at the plaintiff's instance, gave the following instruction, to which defendant objected: "2. Fraud is never to be presumed, but must be affirmatively shown by the defendant herein, upon whom the burden of proving the same rests; and it must not only be proved by the defendant that the misrepresentations were made, but such misrepresentations must have been *the proximate and immediate cause of defendant's action*. It is not enough that they may have remotely contributed to it, *or supplied a motive to the defendant to enter it*. The representations complained of must have been *the ground on which the transaction took place*, and that defendant must have been injured by said representations." This instruction is justly subject to much adverse criticism, when applied to the facts of this case. It, in effect, told the jury that, unless they believed McClintock was moved to enter the promised syndicate and take the deed to the three-twelfths

thereof *solely* by reason of Bauerlein's false representations, they should find for the plaintiff. "It is not enough," declares the court, that "they may have supplied *a* motive to the defendant to enter into it;" but such representations must have supplied the *only* motive for defendant's action—such representations "must have been *the* ground [the only ground] on which the transaction took place," etc. Clearly, the court, in this instruction, went beyond the limits defined in all the well-considered cases. It would seem sufficient that such false representations should constitute *one* of a number of material, moving causes to defendant's action. This rule was clearly announced in the *Bungardt case*, 18 Mo. App. 131, and the pages following, where this court, Judge ELLISON delivering the opinion, used the following language, equally applicable here: "Where the evidence, as in this case, tends to show there were probably two causes or inducements operating on a party, which causes him to make a trade or purchase—one emanating from fraudulent representations of the defendant, and the other from some independent source—he should respond in damages, or restore the property, as the case may be." Numerous judges and text-writers have repeatedly so written; but, to save space, we now refer to the elaborate discussion and citation of authorities, with quotations therefrom, found in 18 Mo. App. at pages 131, 132, 133, 134, etc. Applying this law to the facts of this case, it may be well said that, although McClintock was in part induced to enter this arrangement by a desire on his part to speculate in real estate in and about Independence, yet a further motive may have presented itself and without which he would not have gone into the venture; but yet, under the court's instruction to the jury, as above quoted, this last must have been the *sole* and *only* moving cause for his action, else he could not recover. McClintock may have been eager to invest, yet have declined unless joined by the others who were said to

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compose the syndicate. We must, therefore, hold that the court erred in giving said instruction.

As to the third instruction, given at plaintiff's request, we discover no error. If Bauerlein's representations had reference merely to a future event—an opinion expressed by him that certain parties would in the future join in and make up the talked-of syndicate, then such expressions, however much relied upon by defendant, would constitute no defense to the action. There was, too, some evidence tending to sustain this view.

III. But it is contended by plaintiff's counsel that, even if error was committed in given instructions to the jury, yet the verdict and judgment should stand, because it was clearly for the right party. Counsel base their claim for this position on the ground taken that defendant was not entitled to this defense as against Saunders; that however gross the fraud practiced by defendant's vendors, whereby he may have been fraudulently induced to agree to pay a portion of plaintiff's notes and deed of trust, yet, as the plaintiff was entirely innocent of any complicity in the matter, such fraudulent conduct would be no defense to this action. This question may be thus stated. Can the grantee, in a deed conveying real estate containing a clause that he assumes certain notes against the land as a part of the consideration, set up fraud by his grantor in procuring his acceptance of the deed, in a suit on the implied covenant by the holder of the notes at the time the deed was accepted, he being no party to, and having no knowledge of, the fraud? The authorities cited by defendant's counsel fully sustain the affirmative of this proposition. *Benedict v. Hunt*, 32 Iowa, 27; *Judson v. Dada*, 79 N. Y. 373; *Dunning v. Leavitt*, 85 N. Y. 30; *Crowe v. Lewin*, 95 N. Y. 423; *Bull v. Titsworth*, 29 N. J. Eq. 73; *Parker v. Jenks*, 36 N. J. Eq. 398.

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Plaintiff, however, relies on the case of *Fitzgerald v. Barker*, 96 Mo. 661, as containing the doctrine that no such defense can be made. We have carefully examined and considered this decision, and are of the opinion that it does not support plaintiff's position when applied to the facts of the case at bar. The facts there were, in one important particular at least, substantially different from those here. Although in the last announcement by the supreme court (96 Mo. 662) it is not made clear as to whether or not Fitzgerald purchased the notes *before* or *after* Barker accepted the deed from Thomas (wherein Barker assumed an obligation to pay off the incumbrance), still, as by reference to the same case reported in 4 Mo. App. 105; 13 Mo. App. 192; 70 Mo. 685; 85 Mo. 13, it appears that Fitzgerald became owner of the notes and incumbrance *subsequent* to Barker's assumption, it might be well held, that in that case as Fitzgerald bought the notes with Barker's assumption, then of record, he (Fitzgerald) relied thereon in making the purchase, and it would be unjust to deprive him of such security by reason of the fraud of Barker's grantor, of which he, Fitzgerald, had no notice. Now in the case at bar, it appears without question (indeed, it could not be otherwise) that Saunders acquired the notes sued on some days *prior* to McClintock's acceptance of Mark's deed, wherein he, McClintock, assumed payment of a portion of the incumbrance held by Saunders. When Saunders took the notes with deed of trust, there had been no undertaking by McClintock. He (Saunders), therefore, could not, and did not, rely on this assumption as a security for his claim. He never acted on the faith thereof—never parted with anything on account of such assumption, and, hence, ought not to stand in any better position than McClintock's *promisee*, Marks, or those he represented. It would be the grossest injustice to deny defendant the opportunity for this defense, and we know of no decision or text-book that

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would deprive him of it. Since the preparation of the foregoing we find ourselves sustained in this position by a late case decided by our supreme court. *Ellis v. Harrison*, 16 S. W. Rep. 198.

Other questions suggested in counsel's brief have been considered, but we deem the foregoing all that is necessary to be said in this opinion. For the error, then, in giving the plaintiff's second instruction, the judgment must be reversed and the cause remanded. All concur.

VICTOR B. BUCK, Appellant, v. CHARLES LEWIS, Respondent. 46 227 62 602 | 46 227 99 *551

Kansas City Court of Appeals, June 8, 1891.

1. **Landlord and Tenant**: NOTICE OF INTENTION TO QUIT: LIABILITY CONTINUES: INSTRUCTIONS. A tenant from month to month, who leaves the premises without giving one month's notice in writing to the landlord of his intention to terminate the tenancy, is liable for the rent of such premises for the month succeeding. Instructions set out in the opinion are examined, and some approved and others condemned.

2. ——: REMOVAL: DELIVERY OF KEY: SURRENDER. The removal of a tenant from month to month from the premises, the delivery of the keys to the landlord, or any efforts of landlord to relet the premises, will not amount to an accepted surrender and release of the tenant from liability for the unexpired term.

3. ——: DEFINITION: SURRENDER. A surrender is the yielding up the estate to the landlord so that the leasehold becomes extinct by mutual agreement of the parties. It is either by words by which the lessee manifests his intention of yielding up his interest in the premises, or by operation of law, as for instance, where, by consent of both parties, another becomes tenant of the premises, and the landlord collects rent from him.

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4. ——: QUITTING WITHOUT NOTICE: RELETTING: SURRENDER. Where a tenant from month to month quits without leave, if the landlord after receiving the key and taking possession relets for the next month at the same rent, this would act as a release of the tenant, and if he relets for a part of the month, and receives less rent than would be due from the tenant, the tenant would only be liable for the difference.

Appeal from the Jackson Circuit Court.—Hon. J. H. Slover, Judge.

Reversed and remanded.

Ashley & Gilbert, for appellant.

(1) Tenant from month to month, who leaves premises without giving one month's notice in writing to landlord of intention to terminate tenancy, is liable for rent of such premises for the month succeeding his leaving the premises; and if he leaves in the middle of the rental month, although having paid in advance for such month, he is liable for the rent of the succeeding month. 2 R. S. 1889, sec. 6371; *Gunn v. Sinclair*, 52 Mo. 327; *Winters v. Cherry*, 78 Mo. 349; *Tarlotting v. Bokern*, 95 Mo. 544. (2) Neither removal of tenant from month to month from premises, delivery of keys to landlord, nor any efforts by landlord to rent premises, will amount in law to an accepted surrender and release of tenant from liability for rent for unexpired term of tenancy. *Prentiss v. Warne*, 10 Mo. 601; *Desttrehan v. Scudder*, 11 Mo. 484; *Kerr v. Clarke*, 19 Mo. 132; *Clemons v. Broomfield*, 19 Mo. 118; *Livermore v. Eddy*, 33 Mo. 547; *Mitchell v. Blossom*, 24 Mo. App. 49; *Schuyler v. Smith*, 51 N. Y. 309; *Campbell v. Flynn*, 2 Pa. St. 144; *Brenckman v. Twibill*, 89 Pa. St. 59; *Auer v. Penn*, 99 Pa. St. 370; *Withers v. Larabee*, 48 Maine, 570; *Townsend v. Albers*, 3 E. D. Smith (N. Y.) 560; *Lucy v. Wilkins*, 33 Minn. 441; *Oastler v. Henderson*, 2 L. R. Q. B. Div., p. 575. (3) Removal of tenant, delivery of keys to landlord, putting of rent card in

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window by landlord, are at most evidence of accepted surrender, and release of tenant; and the question as to whether or not defendant had been released by plaintiff from the payment of rent for July should have been submitted to jury. *Pier v. Carr*, 69 Pa. St. 325; *Brenckman v. Twibill*, 89 Pa. St. 58; *Millery v. Becker*, 96 Pa. St. 184; *May v. Luckett*, 48 Mo. 472; *Kingan v. Abington*, 56 Mo. 51. (4) The court erred in giving instruction, numbered 3, in behalf of defendant, as the real issue in the case was whether there had been an accepted surrender of the premises, and thereby a release of defendant from rent for unexpired term, and the burden of proof on this issue was upon defendant. *Auer v. Penn*, 99 Pa. St. 370.

No brief for respondent.

Smith, P. J.—This was a suit commenced before a justice of the peace by the plaintiff against defendant to recover $60 for the rent of the second and third floors of a certain house in Kansas City and for $10 damages done to the same by defendant during his occupancy thereof. The case was removed to the circuit court by appeal, where, in a trial anew, the uncontroverted evidence showed that defendant was a tenant from month to month, paying a rental of $60 per month. The defendant paid the rent for the month of June, 1889, and before the expiration of the month gave plaintiff verbal notice of his intention to terminate his tenancy. Before the end of the month he left the premises. He delivered the keys to plaintiff four or five days after the commencement of the month of July following. The plaintiff went upon the premises soon after the delivery of the keys and put up in the windows notices, "For rent," and endeavored to rent the same to others. In this he was unsuccessful for the month of July. There was evidence also showing that the defendant had injured the casings, split the steps, etc. And that

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damages to the property were $10 or $15. The defendant had judgment from which plaintiff appealed. The single ground of the plaintiff's complaint arises out of the action of the court in the giving and refusing of instructions. The court refused a request by the plaintiff for the following instructions: "1. The jury are instructed to find for the plaintiff."

"3. The jury are instructed that if a tenant from month to month leave such premises without giving his landlord one month's notice in writing of his intention to terminate such tenancy, such tenant is liable for the rent of such premises for the month succeeding his leaving the premises, and if he leaves in the middle of the rental month, having paid in advance for such month, he is liable for the succeeding month.

"4. The court instructs the jury that if they find from the evidence that the defendant, Charles Lewis, rented the second and third floor of 610 Broadway, owned by the plaintiff, as tenant from month to month, and was in possession thereof, after June 1, 1889, as a tenant from month to month, and if the jury further find that said defendant abandoned said premises during said month of June without having previously given plaintiff, or his agent, one month's notice in writing of his intention to terminate such tenancy, then the jury must find for the plaintiff."

The court over the objection of the plaintiff gave this instruction: "1. If the jury believe from the evidence that plaintiff personally, or by his agent, accepted keys to said tenements from the defendant and took possession of said tenements, or rooms, during the month of July, and tried to rent the said number 610 Broadway, to other parties on their own account, without the privity or consent of defendant, then the plaintiff cannot recover the rent for said month."

Upon the undisputed facts of the case the court might well have instructed the jury to find for the plaintiff. It is well settled in this state that a tenant from

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month to month, who leaves the premises without giving one month's notice in writing to the landlord of his intention to terminate the tenancy, is liable for the rent of such premises for the month succeeding. R. S., sec. 6371; *Gunn v. Sinclair*, 52 Mo. 327; *Winters v. Cherry*, 78 Mo. 349; *Tarlotting v. Bokern*, 95 Mo. 544.

The plaintiff's third and fourth instructions should have been given.

The instruction given for defendant was improper. The removal of a tenant from month to month, from the premises, the delivery of the keys to the landlord, or any efforts of the landlord to relet the premises, will not amount to an accepted surrender and release of the tenant from liability for the unexpired term of the tenancy. In *Prentiss v. Warne*, 10 Mo. 602, the supreme court of this state expressly decided that the removal by a tenant and giving the key to the landlord before the expiration of the term does not by operation of law amount to a surrender. In *Livermore & Cooley v. Eddy's Adm'r*, 33 Mo. 546, the trial court gave an instruction which in effect told the jury that if the plaintiff accepted the key of the defendant and took possession of the house and used the same and made repairs thereon on his own account there could be no recovery. The supreme court in criticising this instruction declared that it rested the defendant's discharge not upon any agreement of the plaintiff to discharge him but alone upon his accepting the key, and using and repairing the house. This puts the defense on ground too narrow; it gives the facts enumerated an importance they do not in law possess, and rejects the most essential elements of the defense, the agreement. The plaintiff's possession and use of the property could not, independent of any agreement to acquit, have the effect of acquitting the defendant for the liability for the rent. In *Clemens v. Broomfield*, 19 Mo. 118, it is said, "A surrender by operation of law takes place when

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by consent of both parties another person becomes tenant of the premises, and the landlord collects rent from him." And to the same effect is *Prior v. Kiso*, 81 Mo. 241.

A surrender is the yielding up the estate to the landlord so that the leasehold interest becomes extinct by the mutual agreement of the parties. It is either in express words by which the lessee manifests his intention of yielding up his interest in the premises or by operation of law. There was no pretense in this case that the surrender was based on any agreement for the purpose, but that it took place by operation of law. It is quite apparent from the adjudged cases, to which we have referred, and from many others, both within and without this state, to which we might have referred, that the hypothesis of the defendant's instruction is wrong in its theory of what constitutes a surrender by operation of law. In *Huling v. Roll*, 43 Mo. App. 234, the question of what constitutes a surrender by operation of law underwent examination in the light of the authorities and the rule as there declared is not without application here. *Jones v. Barnes*, 45 Mo. App. 590. If the plaintiff after receiving the key and taking possession of the premises had relet the same to another tenant for the month of July for the same amount of rent for which defendant was bound, this would have operated as a release of defendant, or if he had relet the property for a part of the month and had received therefor an amount of rent less than the defendant was bound to pay, then defendant would have been liable only for the difference between these two amounts.

The judgment must be reversed, and the cause remanded. All concur.

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THE STATE OF MISSOURI, Respondent, v. GUILLIOME MARLIER, SR., *et al.*, Appellants.

Kansas City Court of Appeals, June 8, 1891.

1. **Criminal Procedure: SLANDER: JOINDER OF PARTIES. If several parties all give voice to the same utterance at the same time, or if all concur in the utterance of one, they may be proceeded against jointly, as it is an entire offense,—one joint act done by all,—and, the more there are that joined in it, the greater is the offense.**

2. **———: PLEADING: MATTER IN LANGUAGE IN WHICH SPOKEN. The words alleged to be slanderous should be charged as spoken and in the tongue spoken. They should then, if spoken in a foreign language, be followed by a proper translation; and it is error to set out in the English language words spoken in the French language.**

Appeal from the Barton Circuit Court.—HON. D. A. DEARMOND, Judge.

REVERSED.

J. F. Smith, for appellant.

(1) The motion to quash the indictment should have been sustained. R. S. 1889, sec. 4105, p. 959; 1 Bishop on Cr. Law [6 Ed.] sec. 802, p. 446. (2) The defendant's demurrer to the evidence offered by the state at the close of the state's evidence should have been sustained. The proof was that the defamatory words were not uttered in the English language. It devolves upon the state to prove substantially the words charged; different words of the same import are not sufficient. *Bundy v. Hart*, 46 Mo. 460; *Berry v. Dryden*, 7 Mo. 324; *Birch v. Benton*, 26 Mo. 153; 10 Am. & Eng. Ency. of Law, 454, note 2, and p. 455, note 1. (3) The motion in arrest of judgment should have prevailed. R. S. 1889, sec. 4105, p. 959; Bishop on Cr. Law [6 Ed.] sec. 802, p. 446.

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W. O. Atkeson, Prosecuting Attorney, for respondent.

(1) That they all engaged immediately in the talk, concurred in and approved what each other said to Mary Anneton of a slanderous and indecent character, under the evidence, admits of no doubt. Under our statutes and practice they were all guilty of all the slanderous words charged in the indictment, and proven by the testimony, and were, therefore, properly charged jointly, tried and convicted jointly. It was one offense, and they were jointly guilty. R. S. 1889, sec. 4105; *State v. Steptoe*, 1 Mo. App. 19; 65 Mo. 640; *State v. Derry*, 20 Mo. App. 562; *State v. Forcier*, 17 Atl. Rep. (N. H.) 577; *Cupp v. Commonwealth*, 7 S. W. Rep. (Ky.) 405; Anderson's Law Dictionary, Slander, p. 955. (2) If the third point in appellant's argument is good, it would render the trial of such a case as this impossible in this county. It would require a prosecuting attorney familiar with a nondescript French-Belgian vernacular, a court skilled in a hybrid tongue, and a petit jury of philologists to try such a case as this. This is too much.

Ellison, J.—This is a prosecution by indictment for slander, under section 3868, Revised Statutes, 1889. Three defendants are joined in one indictment, father, mother and son. They are charged to have "then and there" given utterance to the slanderous and defamatory words. They were convicted. Objection is made to the joinder. It has been held that the offense here charged is in its nature separate, and cannot be committed jointly. The better doctrine is, however, to the contrary. If they all give voice to the same utterance at the same time, or if all concur in the utterance of one, they may be proceeded against jointly. 2 Bishop's Crim. Proc., sec. 811; 1 Bishop's Crim. Proc., secs. 467, 470; 2 Bishop's Crim. Law, sec. 948. In the case at bar

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it appears that the defendants and several others met by invitation at the house of one of the number. Among those present was Mary Anneton, an unmarried female, whom defendants are alleged to have accused of being guilty of fornication. It seems to have been understood that each of the party, in turn, should sing a song. The song sung by Guilliome, Jr., appears to have been made up, in part, of slanderous reflections upon Mary, who, together with others of the party, resented the imputations by objecting to the song. A quarrel was thus brought about in which the words alleged in the indictment were used by the defendants. It does not appear clearly whether a part of the words were uttered in the song. But the song as rendered by Guilliome, Jr., was undoubtedly, at the time of its utterance, approved by his father and mother acting in concert with him, though they do not appear to have actually joined in the singing. And the slanderous words following were uttered in concert, are expressly concurred in by each, as found by the jury under proper instructions in this respect. There is a case reported in 2 Burrows, 980, where several were indicted and convicted for singing a song in the public street at the door of Jane Cook. The following verse was, by proper averment, shown to refer to her:

"There are two people in Cheltenham town;
The one a lusty spark;
They both do take delight in game;
Each one doth keep a park.
In one, there is a buck; in the other, there's a doe.
And if you can but favor get, a hunting you may go;
But if that she is going proud, and like to be at rut,
They turn her into a neighbor's park, and there to take the buck;
And when that he has done his best, and this fine *doe* is cloy'd,
Then up she goes to London town, her young one for to hide;
And when she had been there awhile, if that you will but mind,
Then out she cometh from that park and leaves her fawn behind,
But yet awhile in town must stop, till all things safe and sound,
Then home she comes to her own park to take the other round."

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The court said of the objection made of improper joinder, that this was "an entire offense; one joint act done by both. They both joined in the act of singing this libelous and scandalous matter in the public street, at the father's door, with intent to discredit him and his children. And whether it be two songs or one, or a first and second part of the same song, or of separate stanzas, one on John, and another on Jane, yet it is one entire offense; and the more there are that joined in it, the greater is the offense."

II. The defendants are Belgians, and it appears that the words were spoken in the French language in the presence and hearing of Belgians. The cause was tried by the aid of an interpreter. The indictment sets out the words in the English language, and omits to set them out in the language in which they were uttered. This was wrong. The words should be charged as spoken, and in the tongue spoken. They should then be followed by a proper translation. *Zennobis v. Axtel*, 6 T. R. 162; *Warmoth v. Cramer*, 3 Wend. 394; *Kerschbaugher v. Slusser*, 12 Ind. 453; *Hickley v. Grosjean*, 6 Blackford, 351; Odger's Libel & Slan. 109, 110, 470; Newell on Defamation, Slander & Libel, 277, 637. And in this respect there is no difference between a civil and criminal prosecution. *Cook v. Cox*, 3 M. & S. 110. The motion in arrest should have been sustained. We will, therefore, reverse the judgment and discharge defendants. All concur.

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N. C. MERRILL, Respondent, v. THE CENTRAL TRUST COMPANY, Appellant.

Kansas City Court of Appeals, June 8, 1891.

1. **Pleading:** EXHIBITS: PETITION. The exhibits filed along with a petition constitute no part thereof. Its sufficiency must be determined by its face—by its contents—and can neither be aided nor destroyed by an accompanying exhibit.

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2. **Appellate Practice:** EVIDENCE: ABSTRACT. The appellate court cannot pass upon the action of the trial court in refusing to admit in evidence certain letters when the abstract does not set forth the contents of such letters. And the appellate court will not go into and examine the transcript and fish out the matter which is necessary to a full understanding of the questions presented for decision.

3. **Contracts:** MODIFICATION: CONSIDERATION: PLEADING: ANSWER: PRACTICE. By failing to deny under oath the execution of the contract declared on in the petition, its execution was admitted; and if defendant would rely on a new or modified contract subsequently entered into then he should set it up in his answer. The rescission, change or modification of the original contract could only be accomplished by a new agreement supported by a new consideration.

Appeal from the Jackson Circuit Court.—HON. R. H. FIELD, Judge.

AFFIRMED.

L. F. Bird, for appellant.

(1) The court erred in overruling the objection of the defendant and appellant, to the introduction of any evidence under the petition of the plaintiff, for the reason that said petition did not state facts sufficient to constitute a cause of action. Chitty's Pleading, star p. 298. (2) The court erred in excluding as evidence the various letters which passed between the plaintiff and the defendant, and which showed truly the transactions between them, and their understanding from time to time of their said bond transaction. *Hart v. Wire Co.*, 91 Mo. 421, 422; *Hammerslough v. Cheatham*, 84 Mo. 13, 22. (3) The court erred in excluding as evidence the verbal conversation, contract and agreement, had between plaintiff and defendant of Kansas City, on September 12, 1889. (4) The court erred in holding, and in instructing the jury, that the defendant, by its

failure to object specifically and in terms to the plaintiff throwing off the accrued interest on the sugar bonds in refunding them, as soon as it heard it was done, was estopped from claiming such accrued interest. *Bales v. Perry*, 51 Mo. 453; *Rice v. Bunce*, 49 Mo. 349; *Austin v. Loring*, 63 Mo. 22; *Spurlock v. Sproule*, 73 Mo. 504, 509; *Acton v. Dooley*, 74 Mo. 67; *Burke v. Adams*, 80 Mo. 514; *Monks v. Belden*, 80 Mo. 642; *Douglass v. Cissna*, 17 Mo. App. 63; *Miller v. Anderson*, 19 Mo. App. 74; *Weise v. Moore*, 22 Mo. App. 537; *Taylor v. Zepp*, 14 Mo. 482; *Newman v. Hook*, 37 Mo. 207; *Chouteau v. Goddin*, 39 Mo. 229; *Eitelgeorge v. Building Ass'n*, 69 Mo. 56; *Rogers v. Marsh*, 73 Mo. 64; *Noble v. Blount*, 77 Mo. 235, 242.

Muckle & Winn and *George S. Redd*, for respondents.

(1) As a basis for this assignment of error appellant imagines there was an element in the petition which was not there, to-wit, an allegation that respondent sold appellant the Franklin township bonds if they could be refunded; and appellant's counsel thinks no evidence should have been received in support of the petition, because no reason was given in the petition for the failure to deliver the $15,000 worth of Franklin township bonds. (2) In the second assignment of error appellant complains that the court erred in excluding as evidence "various letters." This term "various letters," and the brief, are so vague it is impossible to tell what rulings appellant complains of, or what letters it refers to, or in what respect the letters excluded were material, or how appellant was injured by the ruling of the court excluding them. (3) In the third assignment of error appellant complains that the court excluded as evidence the verbal contract and agreement had between plaintiff and defendant at Kansas City, September 12, 1889. That conversation was

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had between Mr. Merrill and Mr. Guerrier, the secretary of the company, and seems to have been pretty thoroughly detailed. After the amended answer was filed, appellant offered and was permitted by the court to prove what was said in the conversation of September 12, 1889. (4) In the fourth assignment of error the ruling of the court complained of was not excepted to, and, even if erroneous, appellant could not now be heard to urge it for the first time. The appellant has not set out in its abstract the instructions complained of, and is, therefore, not entitled to have them passed upon.

Gill, J.—On January 10, 1890, N. C. Merrill commenced his action in the circuit court of Jackson county, Missouri, against the Central Trust Company, alleging as his cause of action that on or about the twenty-eighth day of August, 1889, he had sold and delivered to the defendant certain municipal bonds of the townships of Center and Forrester, and the city of Ness City, a city of the third class, in Ness county, Kansas, issued under an act of the legislature of the state of Kansas, entitled "An act to encourage the erection of mills and the manufacture of sugar and syrup out of sorghum cane, and authorizing townships and cities of the second and third class to subscribe for stock in sugar factories and to vote bonds therefor," as follows: Bonds of Center township, $15,000; bonds of Forrester township, $15,000; and bonds of the city of Ness City, $15,000: total $45,000, at ninety cents on the dollar of the face of said bonds, flat," that the sale and delivery of said bonds was, however, upon the express condition that said sugar bonds should be compromised and refunded under an act of the legislature of the state of Kansas, approved, March 8, 1879, entitled, "An act to enable counties, municipal corporations, the board of education of any city, and school districts, to refund their indebtedness;" said refunding to be under the direction of said defendant; that said agreement and contract more fully

appears from the written correspondence had between said plaintiff and defendant by and through N. C. Merrill, plaintiff, and C. S. Hetherington, secretary of said defendant, under the following dates, to-wit: July 15, 1889; August 23, 1889; August 26, 1889; August 28, 1889 and August 30, 1889, respectively, which are hereto attached, made a part hereof, and marked respectively, exhibit A, exhibit B, exhibit C, exhibit D and exhibit E; that plaintiff in accordance with the terms of said agreement, and under the direction of defendant, procured the compromise and refunding of all said municipal bonds, and the same were delivered to said defendant, August 30, 1889; that defendant had only paid on said bonds $39,439.22, and there was still due the plaintiff the sum of $1,060.78, which had been due and unpaid since October 20, 1889, and for which plaintiff demanded judgment with interest and cost. To this petition an answer was filed which it is unnecessary to here set out. The substance of the controversy is to be found in certain claims in the nature of set-off set up in the answer. The amount sued for arises out of the following accounting by plaintiff; the bonds of Ness City, Center and Forrester townships, were refunded and delivered to and accepted by appellant.

The purchase price of these bonds at ninety cents flat was.......		$40,500 00
Appellant paid thereon:		
September 12, 1889, advance on purchase price	$10,000 00	
October 14, 1889................	2,000 00	
October 21, 1889................	23,500 00	
December 13, 1889.............	3,924 22	$39,424 22
Balance unpaid.............		$ 1,075 78

This action was brought to recover this balance and interest, but by mistake the amount claimed in the petition is $15 less than this. On the trial it was not disputed that this balance was unpaid, but appellant

as an offset set up the following items, which are the sole matters of dispute, none of them having been allowed by the jury:

Discount on Merrill's note of $10,000...........	$ 73 74
Accrued interest thereon........................	13 19
Express on bonds to Ness City.....................	11 20
Expense of sending Deane to Ness City........	50 00
Expense of sending Deane to Ness City........	73 35
Accrued interest on the sugar bonds, thrown off by way of compromise to induce the municipalities to refund them.....................	787 50

The principal contention on the facts arises as to the above-named "discount on Merrill's note of $10,000," $73.34, and the last item of $787.50 "accrued interest on sugar bonds." By the agreement for purchase of the bonds defendant promised to make an advancement to plaintiff, and the $10,000 credited on plaintiff's account he says was as such advancement, and that he gave his note to defendant for that sum as simply evidence of such advancement. While defendant asserts the advancement of a loan, and that the note by it was discounted to raise money for the common benefit, and that the discount should be charged up to plaintiff, etc. The item of $787.50 is claimed by defendant as the interest accrued on the first batch of bonds before they were exchanged for the refunding bonds, and which plaintiff, it is alleged, threw off and gave to the townships in compromise without the authority of defendant. On the other hand plaintiff claims that he was authorized to make such compromise, and that defendant well knew at the time that such accrued interest on the first series of bonds was to be, and was, given up, and that defendant accepted such new bonds fully understanding the premises. The cause was submitted to a jury, under instructions given at the instance of both plaintiff and defendant, and the verdict and judgment was in plaintiff's favor for the full amount claimed, and defendant appealed.

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I. Defendant in its first assignment of error complains of the court's action in overruling the objection to the introduction of any evidence under plaintiff's petition, for the reason that the same does not state facts sufficient to constitute a cause of action. We fail to discover any ground whatever for this contention. Defendant's counsel seems to attack the petition on the ground that the contract sued on (and which is filed as an exhibit) provides for the sale of other bonds in addition to those mentioned in the petition. But, however that may be, it furnishes no fault as to the face of the petition. The exhibits filed along with the petition constitute no part thereof. Its sufficiency must be determined by its face—by its contents—and can neither be aided nor destroyed by any accompanying exhibit. This petition contains every necessary element in a suit for goods sold and delivered as per contract, alleges the agreement for the sale of a certain article at a certain price, delivery of the article, in pursuance thereof, stating a balance due, and asks judgment therefor.

II. The next matter complained of is in words of counsel that "the court erred in excluding as evidence the various letters which passed between plaintiff and defendant, showing the nature of the transactions between them, and their understanding from time to time of their said bond transaction." We cannot undertake to pass on the question, for the very apparent reason that we are not furnished by the appellant in its abstract with the contents of said "various letters." Hence, we cannot say that the exclusion thereof was proper or improper. On page 21 of the abstract all that is said as to letters offered is this: "Defendant offered letters of N. C. Merrill, dated September 19, September 21, September 24, October 2, October 5, October 7, October 8, October 17, October 23, November 6, November 8, November 8, November 28, showing correspondence about refunding of the bonds. All excluded; defendant excepts." It would seem hardly

necessary so often to remind attorneys practicing in this court that rule 15 (found in the back part of all our published reports) must be observed. It is there made the duty of the appellant in his abstract or abridgment of the record to set forth "so much thereof as is necessary to a full understanding of all the questions presented to this court for decision," etc. Nor, it would seem, is it necessary to again declare (as have all the appellate courts in this state) that we will not go into and examine the transcript, and fish out the matter which "is necessary to a full understanding of the questions presented" for decision. So then, if the appellant here desired to have us to review the ruling of the court below in rejecting certain evidence, that proffered evidence should have been, at least substantially, set out in its abstract.

III. A further complaint is, that "the court erred in excluding as evidence the verbal conversation, contract and agreement had between plaintiff and defendant at Kansas City on September 12, 1889." During the progress of the trial, defendant attempted to prove by a witness on the stand that in September, 1889 (some time after the original written contract was entered into), plaintiff and defendant's managing officer met in Kansas City and orally agreed upon a modification or amendment of the old contract. The court inquired if there was any consideration for such new or modified contract, and, the defendant's counsel failing to claim or to make proof of any, the court sustained an objection to such evidence. In addition to this, plaintiff's counsel, in his brief and supplemental abstract, asserts that in the original answer no such new or modified contract was pleaded, and that when these questions were first propounded the amended answer had not been filed. This being true then it is clear that the court ruled properly in this matter. By failing to deny under oath the execution of the contract declared on in petition its execution stood confessed.

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R. S. 1889, sec. 2186. And, if, while confessing the execution of the contract sued on, defendant would rely on a new or modified contract subsequently entered into, then it should have set up the same in its answer. And, if said original contract was attempted to be rescinded, changed or modified in any way, it could only be accomplished by a new agreement supported by some new consideration.

IV. The further assignments of error (numbered 4, 5 and 6) relate to the giving and refusing instructions, but from the faulty manner of presenting the same we cannot say whether or not the court erred. For instance in assignment 4 it seems defendant's counsel makes some objections to instructions given at the request of plaintiff; but such instructions are not set out anywhere, in abstract or brief; and, hence, not having the same before us, it is impossible for us to say whether such instructions were properly or erroneously given. And in the assignments of error, numbered 5 and 6, complaint is made of the court's refusal to give defendant's instructions 3 and 5, when it does not appear from the abstract that they were refused. The showing is that such instructions were *offered*, but it is not said whether they were given or not. Besides it may be that other instructions given by the court duly and properly presented all the law of the case, and that these instructions (said to be refused) were wholly unnecessary; and, since we are not informed as to what were given, we are justified in the conclusion that these offered instructions were properly rejected. In order to a full understanding of the court's action in this regard, all the instructions given by the court should be exhibited to us.

Since then from this imperfect record we can discover no reversible error, the judgment of the circuit court must be affirmed, and it is so ordered. All concur.

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BAER, SEASONGOOD & CO. v. THOMAS A. GROVES, Defendant; JENNIE G. HOPKINS, Interpleader, Respondent.

Kansas City Court of Appeals, June 8, 1891.

Fraudulent Conveyances: POSSESSION: PRACTICE: DEMURRER TO EVIDENCE. Though a demurrer to an interpleader's evidence might have been sustained, yet, if, as in this case, the subsequent evidence established the interpleader's possession of the attached goods, the finding must be for the interpleader, since possession made a *prima facie* case of ownership which was otherwise uncontradicted.

Appeal from the Jackson Circuit Court.—HON. JAMES GIBSON, Judge.

AFFIRMED.

Garner, Sumerwell & Black, for appellants.

(1) An interplea being in the nature of a replevin, it certainly will not lie where the action of replevin will not; mere naked possession is not sufficient to maintain an action of replevin. To maintain an action of replevin plaintiff must have in himself the right of property, general or special, coupled with the right to the immediate and exclusive possession of the property. *Gertside v. Nixon*, 43 Mo. 138; *Gray v. Parker*, 38 Mo. 160; *Broadwater v. Dorne.* 10 Mo. 285; *Melton v. McDonald*, 2 Mo. 45; *Wright v. Richmond*, 21 Mo. App. 76; *McMahill v. Walker*, 22 Mo. App. 170; *Wright v. Richmond*, 21 Mo. App. 76; Wells on Replevin, sec. 94, p. 59. Especially is this the case where the issue raises the question of title. Such issue is raised in this case by the interplea and answer. *Mirgner v. Biggs*, 46 Mo. 65; *Gray v. Parker*, 38 Mo. 160; *Broadwater v. Dorne*, 10 Mo. 285; *Gertside v. Nixon*, 43 Mo. 138. And the burden of proving such right of

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property, general or special, is upon the plaintiff in a replevin suit, and especially where title is denied. *Gertside v. Nixon, supra; Mirgner v. Biggs, supra;* Greenleaf on Evidence, secs. 561–2; *Hewson v. Tootle*, 72 Mo. 637; *Mills v. Thompson*, 61 Mo. 407; *Nolan v. Deutch*, 21 Mo. App. 1; *Abernathy v. Whitehead*, 69 Mo. 28. (2) Agency cannot be proven by the declaration of the agent. The declarations of Jordan that he was in possession of the stock of goods in controversy as the agent or representative of the interpleader were incompetent, and do not establish agency or the possession of the interpleader. *Peck v. Ritchy*, 66 Mo. 114; *Franklin v. Ins. Co.*, 52 Mo. 461; *Calvin v. Smith*, 21 Mo. 444; *Sutton v. Casseleggi*, 5 Mo. App. 119.

Shewalter & Wilson, for respondent.

(1) The possession of personal property raises a presumption of title, and the burden of rebutting this presumption is upon the party who denies such title; this is not only elementary, but is expressly so held by our supreme court. Lawson on Presumptive Ev., p. 428; 2 Greenleaf, sec. 637; *Singer v. Goldenburg*, 17 Mo. App. 549; *Summons v. Austin*, 36 Mo. 307; *Smith v. Lydick*, 42 Mo. 209; *Weeks v. Etter*, 81 Mo. 375; *Bank v. Overall*, 16 Mo. App. 510. This being a legal presumption, it follows in all cases, and is not dependent on the nature or character of the case. From possession the law presumes ownership. (2) The objection to the testimony of Young, as to the declaration of Jordan while in possession of the goods, is not well taken. There was no demurrer to the interpleader's evidence, whose case in chief rested on this testimony, but the appellants assumed the burden, introduced Thomas A. Groves who testified as a fact that at the time of the seizure Mrs. Hopkins was in possession, and he, Groves, had no possession whatever.

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Even when a plaintiff's case is not made in chief, and defendant introduces evidence which supplies this defect, the evidence will sustain the verdict, since the finding must be upon all of the evidence in the case.

ELLISON, J.—Plaintiffs are attachment creditors of defendant. A stock of goods was seized under the attachment writ as being the property of defendant. Mrs. Hopkins filed her interplea, and on trial below recovered. Plaintiffs appeal.

The testimony for interpleader showed her to be in exclusive possession of the property, by her agent, at the time of the seizure. Objection is made here that the agent's declaration of his agency is not competent. Be that as it may, as applied to this case, yet it was shown by witness Groves, introduced by plaintiffs, that the interpleader was in the exclusive possession at the time of the original levy. If plaintiff had interposed a demurrer to interpleader's case at the close of her testimony, and stood upon it, the question might well be urged, that there was no case made. But the evidence afterwards introduced made it appear who was in possession at time of levy. This possession made a *prima facie* case of ownership, and, not being contradicted, interpleader was, of course, entitled to recover. An examination of authorities cited by plaintiffs show them not applicable to the facts and circumstances of this case. The judgment will be affirmed. All concur.

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G. J. CLARK, Respondent, v. THE PEOPLE'S COLLATERAL LOAN COMPANY, Appellant.

Kansas City Court of Appeals, June 8, 1891.

1. **Appellate Practice:** REVIEWABLE OBJECTIONS TO EVIDENCE: MOTION FOR NEW TRIAL. An objection to evidence on the ground that it is immaterial, irrelevant, incompetent, improper or illegal, is so general that nothing is saved which can be reviewed by the revisory court. Objections to evidence must be specific, calling the court's attention to the particular ground thereof; and specific objection cannot be injected into the cause by the motion for a new trial, and in that way obtain recognition in the appellate court.

2. **Sales:** WARRANTY OF TITLE: EVIDENCE: CONVERSATION. Plaintiff sued upon an implied warranty of title in the sale of a typewriter; defendant's contention was that it had given an option on the typewriter to A. who, before the time expired, sold it to plaintiff. It was undisputed that plaintiff gave his check to A., and, on his indorsement thereof to defendant. the latter paid him the difference between its price to him and his price to plaintiff. *Held*, the conversations between A. and defendant's agent—all the verbal acts of the parties connected with the transaction—should have been admitted in evidence to enable the jury to determine the question as to whom the sale was made by the defendant.

3. ——— : ——— : INSTRUCTIONS: ISSUES. Instructions set out in the opinion are criticised, since they nor any other instruction informed the jury what the issues were, and ignored the essential and constitutive fact that they must find that plaintiff had surrendered the typewriter to a person having a paramount title thereto.

Appeal from the Jackson Circuit Court.—HON. JAMES GIBSON, Judge.

REVERSED AND REMANDED.

Karnes, Holmes & Krauthoff, for appellant.

(1) The justice's judgment was absolutely void, especially against this defendant, because the necessary jurisdictional facts do not appear from the justice's

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record. This proposition requires no citation of authorities in this state. *Zimmerman v. Snowden*, 88 Mo. 218; Bigelow on Estop. [4 Ed.] p. 48. It is only where the statute does not require the essential facts to be entered of record by the justice on his docket that they may be established otherwise than by the docket itself. *Kansas v. Alexander*, 92 Mo. 660, 671. The jurisdiction of the justice had become *functus officio*. *Sullivan v. Donnell*, 90 Mo. 258; *Nelson v. Campbell*, 24 Pac. Rep. 539; *French v. Higgins*, 45 N. W. Rep. 817; *State v. Collins*, 46 N. J. Law, 167; *Redford v. Snow*, 46 Hun, 370. It follows from this that the plaintiff's first instruction should have been refused, because it permits plaintiff to recover without any proof whatever of the paramount title in Olmstead to whom he had surrendered the title. (2) This instruction is also erroneous in that it authorized plaintiff to recover "the amount actually paid in costs by plaintiff in defending his title to said property," there being no evidence of the amount of any such costs. (3) The court erred in refusing to permit appellant to prove the conversations between Andrus and Hurlbut in regard to the property.

Robinson, O'Grady & Harkless, and *Hayward & Griffin*, for respondent.

(1) No question of the kind raised by the first division of appellant's brief was suggested or adverted to at the trial in the circuit court. We are now called upon to reply to objections started for the first time in this court. Appellant's objection is that the first instruction "does not require the jury to find that the person to whom plaintiff had surrendered the typewriter held a paramount title thereto, nor is this omission supplied by any other instruction in the case." *Davis v. Brown*, 67 Mo. 313; *Whetstone v. Shaw*, 70 Mo. 575; *Noble v. Blount*, 77 Mo. 241; *Walker v. Owen*, 79 Mo. 563; *Holmes v. Braidwood*, 82 Mo. 610–17; *Nance v. Metcalf*, 19 Mo. App. 190. It is not necessary that each

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instruction in a case should in and of itself comprehend the whole law of the whole case. Nor is it necessary that an instruction should be given on a matter not in issue or disputed. *Pope v. Railroad*, 99 Mo. 400, disposes of this objection. *Hyatt v. Railroad*, 19 Mo. App. 293; *Schlicker v. Gordon*, 19 Mo. App. 487; *Corn v. City of Cameron*, 19 Mo. App. 582; *Fell v. Mining Co.*, 23 Mo. App. 224; *Willis v. Stevens*, 24 Mo. App. 503. (2) The exclusion of conversations between defendant and Andrus, complained of in the second part of appellant's brief, proceeded upon a principle too plain and familiar to be quoted or to sustain by citation. The view taken by the court was more favorable to appellant than the well-settled principles will warrant; and the only plausible argument to be made in favor of appellant's contention arises from the illogical concession made to it by the court.

Smith, P. J.—This action originated before a justice of the peace, and was based upon a breach of an implied warranty of title in the sale of a typewriter. The plaintiff had judgment in the circuit court, from which defendant appealed.

I. At the trial, the plaintiff, to maintain the issue in his behalf, offered in evidence the judgment of a justice in an action of replevin, wherein K. M. Olmstead was plaintiff and Clark, the plaintiff in this suit, was the defendant, to which offer the defendant objected on the ground that the judgment was immaterial, which objection was by the court overruled, and to which ruling the defendant excepted. The question now presented by the defendant's appeal is, whether this objection saved anything which we can review. The rule has been long and well settled in this state by an unbroken line of decisions, that an objection to evidence on the ground that it is immaterial, irrelevant, incompetent, improper, or illegal is so general that nothing is saved which can be made the subject of review

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by the revisory court. Objections to evidence, to be available in the appellate court, must be specific. The particular ground of the objection must be shown to have been called to the attention of the trial court. For instance, if evidence is claimed to be immaterial, the specific grounds upon which that claim was made must be preserved and presented by the bill of exceptions, otherwise the objection will not be noticed. A party will not be permitted to interpose a general objection to the evidence of the character already indicated in the trial court, and when the cause reaches the appellate court then suggest there for the first time specific objections to such evidence. The reason for this is that it is unfair to the trial court as well as to the adverse party. Another reason for this rule is that it may have been that, if the specific objection had been called to the attention of the trial court, the other party could have obviated it. The objection of the defendant to the evidence offered by the plaintiff was so general that it saved nothing which we can consider. The cases all attest this. *Taussig v. Schields*, 26 Mo. App. 318; *Dickey v. Malechi*, 6 Mo. 177; *Cozzins v. Gillipsee*, 4 Mo. 83; *Fields v. Hunter*, 8 Mo. 129; *Clark v. Conway*, 23 Mo. 438; *Margrave v. Ausmuss*, 51 Mo. 561; *Buckley v. Knapp*, 48 Mo. 152; *Woodburn v. Cogdal*, 39 Mo. 222; *Public School v. Risley Heirs*, 40 Mo. 358; *Railroad v. Moore*, 37 Mo. 338; *Blakely v. Railroad*, 79 Mo. 389; *Walker v. Owens*, 79 Mo. 567; *Schouler v. Schouler*, 18 Mo. App. 79; *Zelief v. Schuester*, 31 Mo. App. 499. The special objection to the admissibility of the judgment in evidence now urged, not having been suggested and passed upon by the court below during the progress of the trial, could not be afterwards injected into the cause by the motion for a new trial, and in that way obtain recognition here. *Mall v. Railroad*, 97 Mo. 75. This evidence, in effect, was omitted without objection, and it cannot be

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made the subject of complaint here. *Thornton v. Railroad*, 40 Mo. App. 269; *Schouler v. Schouler*, 18 Mo. App. 74. We may remark, that there was no demurrer interposed to the plaintiff's evidence by defendant. The process and the return thereon, the bond and the judgment, we must hold were in effect admitted in evidence in the court below without challenge.

II. The defendant further contends that the trial court erred in refusing to permit it to prove conversations between Andrus and Hurlbut, in regard to the typewriter. It was not controverted that the sale of the typewriter to plaintiff was through the instrumentality of Andrus; but whether defendant sold it to Andrus and he to plaintiff, or whether plaintiff bought it from defendant through Andrus, were questions about which there was a dispute. The transaction between Hurlbut and Andrus respecting the typewriter seems to have been conducted orally, and no good reason is perceived why these conversations were not admissible. Especially so in view of defendant's contention, which was, that it had given Andrus an option on the typewriter at $48, and that before taking it he negotiated a sale to plaintiff and brought him to defendant's place of business to see it, and who after examination concluded to take it. It was not disputed that plaintiff gave his check to Andrus for $60, the price of the machine which Andrus had named to him, nor that defendant, on the indorsement of the check to it, paid Andrus $12, the difference between the $48, at which the defendant had priced the machine to him, and that which plaintiff paid Andrus for it. Under these circumstances, all the verbal acts of the parties connected with the transaction should have gone to the jury for the purpose of enabling it to determine the question as to whom the sale of the typewriter was made by the defendant. It may have been that there were two sales of the machine accomplished simultaneously by the transaction, one by defendant to Andrus, and another by Andrus to plaintiff. The

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conversations, and not the conclusions, of the witnesses should have been admitted to enlighten the triers of the fact. They should have been accorded the privilege of hearing what these conversations were, and of drawing their own conclusions as to the controverted facts which it was contended they would tend to prove.

III. The defendant further insists that the court erred in giving the following instruction for the plaintiff: "The court instructs the jury that if they believe from the evidence that the plaintiff purchased the typewriter in question from defendant, and that defendant was in possession thereof at the time of such purchase, and received the purchase money from plaintiff, and delivered said typewriter to plaintiff, or caused the same to be delivered to him, then the law implies that the defendant warranted the title to the property, and you will find for the plaintiff.

"If you find the issues with the plaintiff, in assessing his damages you will give him the amount paid for the property in question with interest at six per cent. from the time of demand if any was made of defendant therefor, together with the amount actually paid in costs by plaintiff in defending his title to said property." Neither did this or any other instruction tell the jury what the issues were, which it had been sworn to try. This should have been done in this or some other instruction, before telling the jury that, "if they found the issues with the plaintiff," they should give certain damages, etc. *Gessley v. Railroad*, 26 Mo. 156; *Cocker v. Cocker*, 2 Mo. App. 450; *Butcher v. Death*, 15 Mo. App. 271; *Fleischman v. Miller*, 38 Mo. App. 177; *Clark v. Fairley*, 30 Mo. App. 335; 2 Thompson on Trials, sec. 2314. If the jury found every fact embraced in the hypothesis of the instruction, this would not have rendered defendant liable. It ignored an essential and constitutive fact, in that it did not require the jury to find that the plaintiff had surrendered the typewriter to a person having a paramount

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title thereto. If the defendant had warranted the title to the machine, yet, unless the jury found the facts constituting a breach of it, there could be no verdict against him for damages. The instruction ignored this essential fact in the case upon which the plaintiff's right of recovery depended. This was reversible error. *Clark v. Fairley*, 24 Mo. App. 429; *Bank v. Metcalf*, 29 Mo. App. 384; *Fink v. Phelps*, 30 Mo. App. 431; *Stocker v. Green*, 95 Mo. 113.

The judgment must be reversed, and the cause remanded. All concur.

46	254
51	190
46	254
58	141
46	254
62	663
46	254
76	18
46	254
85	349

J. EDGAR GUINOTTE, Trustee, Respondent, v. ISAAC M. RIDGE, Appellant.

Kansas City Court of Appeals, June 8, 1891.

1. **Construction:** EVIDENCE: TRUSTEE OF EXPRESS TRUST: ASSIGNMENT: POWER OF ATTORNEY. An assignment of certain tax bills with a declaration of partnership therein with one T., and a general power of attorney, both set out in the opinion, constitute plaintiff a trustee of an express trust, and authorized him to sue in his own name, without joining with him the person for whose benefit the suit is prosecuted; and the fact that T., the named partner, did not sign or execute any written authority to plaintiff is of no consequence.

2. **Pleading:** GENERAL DENIAL: EVIDENCE. The defendant by merely answering the allegations in the petition can only try such questions of fact as are necessary to sustain the plaintiff's case. If he intends to rely upon any matter which goes to defeat or avoid the plaintiff's action, he must set forth in clear and precise terms each substantive fact intended to be relied upon, else he will be precluded from giving evidence of it upon the trial.

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3. ——— : SPECIAL TAX BILL : GENERAL DENIAL : KANSAS CITY CHARTER. In an action to enforce a special tax bill under the charter of Kansas City, it is sufficient to plead the making and issue of the tax bill sued on, giving the date and contents thereof, and assignment thereof in case of assignment, filing the same, and allege that the party or parties made defendant own or claim to own the land charged, etc. The owner may plead in defense the imperfect character of the work, etc. Plaintiff does not have to allege or prove the work was well and faithfully done; and a general denial does not raise the question as to the character of the workmanship, which must be specifically alleged in the answer.

Appeal from the Jackson Circuit Court.—HON. JOHN W. HENRY, Judge.

AFFIRMED.

Silas F. Allen and *A. H. Hoge*, for appellant.

(1) In order to recover, respondent must prove all the material allegations of the petition. An instrument signed by Bingham alone was read in evidence, which purports to be an assignment of a half interest in his contract to Todd, and which recites and ratifies the power of attorney executed by Bingham to J. E. Guinotte, the respondent. This power of attorney, then read in evidence, simply gives to respondent the right to receive from and receipt to the city engineer all tax bills issued under the contract. It is nothing more nor less than a naked authority given by Bingham to respondent to receive these tax bills from the engineer. There is no transfer of title or of any interest in the tax bills to respondent. There is no authority given him to sue or collect upon them. *Headlee v. Cloud*, 51 Mo. 301; *Beattie v. Lett*, 28 Mo. 596; *State to use v. Matson*, 38 Mo. 489; *Furniture & Lumber Co. v. Roddatz*, 28 Mo. App. 210. (2) Again, the respondent cannot recover if it appears from the evidence, under the pleadings, that the contractor failed substantially to comply with the terms of his contract. The tax bills, under

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the statute, are only *prima facie* evidence of the matters therein recited, and this statute has never been held to preclude the introduction of positive testimony contradicting such recitals. *Meyer v. Wright*, 19 Mo. App. 283; *City to use v. Clemens*, 49 Mo. 552. (3) A general denial puts in issue each and every material allegation contained in the petition, and under a general denial the defendant may prove any fact going to show that the plaintiff never had any cause of action against him. *Greenway v. James*, 34 Mo. 328; *Hoffman v. Perry*, 23 Mo. App. 20; *Stewart v. Goodrich*, 9 Mo. App. 125; *Allen v. Richard*, 83 Mo. 55; *Cavender v. Waddington*, 2 Mo. App. 556; *State to use v. Williams*, 48 Mo. 210; *Spring v. Conway*, 75 Mo. 510; *Traders' Bank v. Payne*, 31 Mo. App. 512; *Industrial Home v. Fritchey*, 10 Mo. App. 344. In a suit on a special tax bill, if the defendant show that there was not a substantial compliance with the contract, plaintiff cannot recover. *Bank v. Payne*, 31 Mo. App. 512; *Meyer v. Wright*, 19 Mo. App. 283.

Karnes, Holmes & Krauthoff, for respondent.

(1) All questions on this score were put at rest by the subsequent transfer to Guinotte. The criticism upon this instrument seems to be that it is not signed by Todd. As the tax bills were payable to Bingham, Todd could only claim by a transfer, and was bound to take his title subject to the conditions of the transfer. So that, if Todd made claim, it would stand subject to the provision that Guinotte should collect. Unless he accepted the transfer as made, he had no interest in the bills. If Todd repudiated this transfer, Bingham was left as the sole holder, and his act alone could transfer the legal title to the instruments. *Rogers v. Gosnell*, 58 Mo. 589; *Lewis v. Ins. Co.*, 61 Mo. 534, 538; *Tureman v. Stephens*, 83 Mo. 218. (2) The point of objection is that Todd should have been joined as a plaintiff.

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So far as Bingham's interest is concerned that has confessedly passed to Guinotte. It seems to be assumed that Todd might claim under one part of the instrument, and, by repudiating the remainder of it, deny Guinotte's right to collect and sue in his own name for his half, even after it was barred by the statute. This is purely a question of defect of parties. Not having been raised by answer, it stood waived. *Rickey v. Tenbroeck*, 63 Mo. 563, 570; *State v. Berning*, 74 Mo. 87, 99; *Young Men's Ass'n v. Dubach*, 82 Mo. 475, 481; *Pike v. Martindale*, 91 Mo. 268, 278; *Garrett v. Cramer*, 14 Mo. App. 401, 404; *Shockley v. Fischer*, 21 Mo. App. 551, 556. (3) All the facts enumerated in the charter were alleged and proved by the plaintiff. The defendant offered evidence dehors the tax bills and of matters not embraced within the specified allegations. His only pleading was a general denial. *Northrup v. Ins. Co.*, 47 Mo. 435, 444; *Hudson v. Railroad*, 101 Mo. 13, 29, 30. The plaintiff was not required to make any proof as to the matters sought to be shown by the excluded evidence. This is the test by which to determine what is "new matter" required to be specially pleaded. Bliss on Code Plead. [2 Ed.] sec. 352, *Williams v. Mellon*, 56 Mo. 262, 264; *Harrison v. Railroad*, 74 Mo. 364, 373; *Kersey v. Garton*, 77 Mo. 645, 647; *Zoll v. Carnahan*, 83 Mo. 35, 41; *Musser v. Adler*, 86 Mo. 445, 449; *Taylor v. Railroad*, 26 Mo. App. 336, 341; *Hudson v. Railroad*, 32 Mo. App. 667, 680.

GILL, J.—One J. H. Bingham was a contractor with the City of Kansas to construct a first-class sidewalk along a portion of Main street, and defendant Ridge, the owner of certain abutting lots. After the completion of the work tax bills were issued by the proper officer and delivered to Bingham (or rather to Guinotte, his assignee), and this suit is brought by Guinotte, under an alleged assignment from Bingham to enforce payment of six of these tax bills charged against as many

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lots owned by Ridge. The parties waived trial by jury, and submitted the cause to the court below, where plaintiff had judgment, and defendant appealed.

I. There are two grounds relied on for reversal: *First.* It is contended that there was no evidence tending to show that Guinotte was the legal owner or was entitled to sue on the tax bills as trustee or otherwise. We must decide this point against the defendant. To establish his right to sue, plaintiff at the trial offered the two instruments of writing following:

"For value received I hereby sell, assign and transfer to George Todd an undivided one-half interest in my contract with the City of Kansas, dated January 6, 1886, to construct a first-class sidewalk on a part of Main street, in pursuance to ordinance 31347 of the City of Kansas, approved October 6, 1885, it being hereby intended to make said Todd my full partner in said contract, and the proceeds thereof, after paying all lawful claims and expenses arising out of the execution of said contract, to be equally divided between said Todd and myself. And it is hereby mutually agreed that J. E. Guinotte, authorized by power of attorney, this day given by me, receive and receipt for to the city engineer of said city for tax bills issued in pursuance of said ordinance and contract, and hold and collect said tax bills in trust for said Todd and myself and pay out of same, *first,* all debts and expenses growing out of said contract; *second,* divide balance of said tax bills or proceeds equally between us.

"J. H. BINGHAM."

"GENERAL POWER OF ATTORNEY.

"Know all men by these presents, that I, J. H. Bingham, of the City of Kansas, county of Jackson, in the state of Missouri, have made, constituted and appointed, and by these presents do make, constitute and appoint, J. E. Guinotte my true and lawful attorney for me, and in my name, place and stead to receive from and receipt to the city engineer of the City of Kansas all

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tax bills to be issued to me in pursuance of my contract with said city, under ordinance number 31347, entitled 'An ordinance to construct a first-class sidewalk on a part of Main street, approved October 16, 1885,' giving and granting to my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully and to all intents and purposes, as I might or could do if personally present at the doing thereof, with full power of substitution or revocation, hereby ratifying and confirming all that my said attorney may or shall lawfully do, or cause to be done, by virtue hereof. In testimony whereof I have hereunto set my hand and seal this ninth day of January, 1886.

"[Seal.] J. H. Bingham."

The contention seems to be: *First*, that these writings, signed by the party to whom the tax bills were to be issued under the contract with the city, only empowered Guinotte to "*receive and receipt*" for the said tax bills—that this was the extent of his authority. While the construction of the words in the power of attorney may be subject to doubt, yet the other paper, executed at the same time, leaves no room to question the intention of the parties. It is there provided that "J. E. Guinotte (authorized by power of attorney this day given by me) receive and receipt for to the city engineer of said city for tax bills issued in pursuance of said ordinance and contract, and *hold and collect* said tax bills in trust for said Todd and myself," etc. Here clearly appears a declaration of intention by the holder of the tax bills that Guinotte take the same and proceed to collect for the joint benefit of Todd and Bingham, and with "full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises," etc. If the bills were not paid, then Guinotte was manifestly authorized to sue in his own name for the enforcement thereof. He was made a trustee of an

express trust, and as such was authorized to sue in his own name, without joining with him the person for whose benefit the suit is prosecuted. R. S. 1889, sec., 1191. That Todd did not sign or execute any written authority to Guinotte, is of no consequence. The tax bills stood in the name of, and were owned by, Bingham, and he agreed to turn over the one-half net proceeds to Todd; and if Todd accepted this transfer then he took the same with its incumbrance, to-wit, the authorization to Guinotte to receive the same, and collect, by suit or otherwise. In the transfer to Todd this express reservation is made, and he, therefore, took the assignment of said beneficial interest *cum onere*. *Tureman v. Stephens*, 83 Mo. 218.

II. The remaining assignment of error is thus expressed by defendant's counsel: "Because the court erred in refusing to permit the appellant, in the trial of said cause, to introduce evidence tending to show that the contractor, Bingham, had not constructed the sidewalk in question according to the terms of his contract, and the ordinance of the City of Kansas under which said contract was made." The evidence here alluded to, and which was by the court excluded, was of this nature: That the sidewalk was not laid upon a bed, five inches in depth, of sharp, coarse, river sand, as provided by the ordinance for the work, but on the other hand that it was laid upon a bed composed of ashes, cinders and refuse matter, and that, because of its being bedded on inferior material, the said walk was unsubstantial and inferior. Under the state of the pleadings in this case the exclusion of this evidence was entirely proper. The answer to each count consisted of a general denial, except only an admission of the incorporation of the City of Kansas, and that an ordinance had been passed providing for the sidewalk in question. The trial court in sustaining the objection to this testimony is well supported by the uniform rulings of the courts of this state. The correct rule was well expressed by our supreme

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court twenty years ago. In *Northrup v. Ins. Co.*, 47 Mo. 444, it was said: "The defendant, by merely answering the allegations in the plaintiff's petition, can only try such questions of fact as are necessary to sustain the plaintiff's case. If he intends to rely upon any matter which goes to defeat or avoid the plaintiff's action he must set forth in clear and precise terms each substantive fact intended to be relied on. It follows that, whenever a defendant intends to rest his defense upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out according to the statute in ordinary and concise language, else he will be precluded from giving evidence of it upon the trial." To same effect see *Hyde v. Hazel*, 43 Mo. App. 668; Bliss on Code Pl., sec. 352; *Kersey v. Garton*, 77 Mo. 647; *Cumiskey v. Williams* 20 Mo. App. 611; *Williams v. Mellon*, 56 Mo. 263; *Hudson v. Railroad*, 101 Mo. 29.

It is then only the *material* (necessary) allegations of the petition which are to be tried on a general denial. The Kansas City charter, which authorized this work and the said tax bills, provides how the said bills may be enforced, as well as to what is necessary to be alleged in the petition. "It shall be sufficient for the plaintiff to plead the making and issue of the tax bill sued on, giving the date and contents thereof, and assignment thereof in case of assignment, filing the same, and allege that the party or parties, made defendants, own or claim to own the land charged or some estate or interest therein as the case may be." Charter Laws, 1875, sec. 4, art. 8, p. 252. And it is there, too, further provided in effect that the owner may *plead in defense* the imperfect character of the work, etc. So then it is clear that the plaintiff here was not required to allege affirmatively in his petition that the work for which the tax bills were issued was well and faithfully done, as provided by the contract or ordinance. And as he was not required to so plead, neither was he required to prove the same.

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The tax bills when presented made a *prima facie* case, and, if defendant desired to raise any question as to the character of the workmanship, such defense should have been specially alleged in the answer. The allegation in plaintiff's petition, "that the work was done and the materials were furnished by said Bingham in full accordance with the terms, and by virtue of the contract, etc., and a general denial thereto did not produce the triable issue here contended for. The general denial of the answer only puts in issue, and permits a trial of, the *allegations necessary to the support of the plaintiff's case.* Whatever then may be voluntarily stated in the petition—whatever facts may be there alleged which are unnecessary to sustain plaintiff's case—such allegations are merely surplusage, and, even if defendant should in his answer deny the same, yet he will not be allowed to give evidence thereon, because not set out in his answer according to the statute in ordinary and concise language. This rule of pleading is forcibly illustrated in the late case of *Hudson v. Railroad, supra.* It was there alleged in plaintiff's petition "that by said negligent acts, and *without fault on his part,* he was then and there caught between two of said cars," etc., and the answer thereto was a general denial. It was contended that thereby the issue of contributory negligence was raised. But the court decided otherwise, and held that notwithstanding such unnecessary averment by plaintiff in his petition (that the injury occurred "*without fault on his part*") a general denial in the answer did not raise the issue of contributory negligence. The cases cited by defendant's counsel, all of which we have examined, do not conflict with this position.

Judgment affirmed. All concur.

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JOSEPH CAHN & CO., Appellants, v. THOMAS A. GROVES, Defendant; JENNIE G. HOPKINS, Interpleader, Respondent.

Kansas City Court of Appeals, June 8, 1891.

Fraudulent Conveyances: EVIDENCE: VENDEE'S PARTICIPATION. Under the facts, this case belongs to that class of cases where a sale is made to defraud creditors, in which the fraudulent intent is shared by the vendee; and this issue has been fairly submitted to the jury, whose finding is affirmed.

Appeal from the Jackson Circuit Court.—HON. JAMES GIBSON, Judge.

AFFIRMED.

Karnes, Holmes & Krauthoff and *Graves & Aull*, for appellants.

(1) The sale of the goods, in order to be considered *bona fide* with respect to creditors, must have been made without any trust whatever, either express or implied. *Mfg. Co. v. Steele*, 36 Mo. App. 496; *Coburn v. Pickering*, 3 N. H. 424; *Parker v. Patte*, 4 N. H. 178; *Connelly v. Walker*, 45 Penn. St. 449; *Reed v. Pelletier*, 28 Mo. 177; *State v. Tasker*, 31 Mo. 448; *Bullene v. Barrett*, 87 Mo. 189; *Passamore v. Eldridge*, 12 Serg. & R. (Pa.) 198; *Hanna v. Finley*, 33 Mo. App. 645; *Coolidge v. Melorn*, 42 N. H. 522; *Long v. Stockwell*, 55 N. H. 563; *McCullaugh v. Hutchins*, 7 Watts, 434; *State v. Jacob*, 2 Mo. App. 183; *Twyne's Case*, 1 Lin. Lead. Cases, 34; *State v. Mueller*, 10 Mo. App. 87; *Holmes v. Braidwood*, 82 Mo. 610; *Gaff v. Stern*, 12 Mo. App. 115; *Mc Veagh v. Baxter*, 82 Mo. 518. The law condemns secret trusts as fraudulent, and avoids the entire transaction, regardless of the actual good faith of the parties. (2) It is immaterial whether the whole agreement appear in the writing, or that on its face it appear entirely fair and the impeaching facts attached by extrinsic evidence. The creditor acting as the secret trustee will not be saved

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from the consequences of a secret trust for benefit of debtor by showing that his claim equaled or exceeded the value of the property. (3) Knowledge that debtor owed one of creditors is sufficient to impart notice as to all creditors. *Gaff v. Stern*, 12 Mo. App. 115. Knowledge that the debtor was in trouble is sufficient to charge with notice of fraud. *Henry v. Sneed*, 99 Mo. 407. With notice of attachment one cannot be a *bona fide* purchaser. *Young v. Keller*, 94 Mo. 581; *McMichael v. Richter*, 13 Mo. App. 515; *Wormley v. Wormley*, 8 Wheat. 449; *Daugherty v. Cooper*, 77 Mo. 528; *Arnholt v. Hartwig*, 73 Mo. 485.

Shewalter & Wilson, for respondent.

(1) It is settled a debtor may prefer by a sale one creditor—may pay one and leave the others unpaid; and even knowledge of the creditor of a purpose on the part of the debtor to hinder or delay other creditors will not invalidate the sale. *Shelley v. Boothe*, 73 Mo. 74; *Holmes v. Braidwood*, 82 Mo. 610; *Albert v. Besel*, 88 Mo. 150; *Sexton v. Anderson*, 95 Mo. 373; *Van Raalte v. Harrington*, 101 Mo. 652. And, when a debtor purchases at a price in excess of his debt, such sale is valid, unless the creditor knew that it was the intent of the debtor by such sale to hinder, delay or defraud his other creditors. *Van Raalte v. Harrington, supra; McVeigh v. Baxter*, 82 Mo. 518; *Forrester v. Moore*, 73 Mo. 651. The court so declared the law; but there is abundant authority that mere knowledge alone is not sufficient, though, as said, in this case the jury were told if there was an excess above the debt of the interpleader, and if she had any knowledge of any fraud, the sale was void. Because a purchase by A., a creditor, of goods for $8,000 ($5,000 of which are debts due A.), with the further agreement that the notes for the balance of $3,000 above the debts shall be credited by whatever amount, if any, on taking an invoice, the stock falls short of the $8,000, accompanied by a delivery of the goods to A., vests the

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absolute title to the property in A., without any trust or interest in the goods in the seller. *Ober v. Carson*, 62 Mo. 209; *Millian v. Schwetzer*, 87 Mo. 402; *Corby v. Corby*, 85 Mo. 371.

ELLISON, J.—Plaintiffs are creditors of defendant, and sued out an attachment which was levied upon the stock of goods in controversy. Mrs. Hopkins filed her interplea claiming the property. She prevailed below, and plaintiffs appeal. Defendant, prior to the attachment, was a merchant and owned the goods. He was indebted to plaintiffs and various other parties; among others, to this interpleader. Interpleader knew of his debts. He owed her $5,000, and finding himself financially embarrassed, we will say insolvent, went to interpleader, who is his sister, and proposed to her that to save her debt she should buy the stock. She made the purchase at the price of $8,000 which was to be paid by the surrender of demands against defendant, and giving to him her notes aggregating $3,000, with the understanding that if the stock inventoried less than $8,000 she was to be credited on her notes. If more than $8,000, she would pay the overplus in addition. She took immediate possession, but did not make an inventory till the levy of the attachment which was three days after the transfer.

The foregoing facts are stated as strongly against interpleader as the record will bear. From them, plaintiffs contend that there was a secret trust between defendant and interpleader, and, as such, it was in law a fraud upon them as creditors of defendant, and that the case is covered by *Molaska Mfg. Co. v. Stewart*, 36 Mo. App. 496. We are not of this opinion. There is nothing to show that interpleader had any reserved interest in the goods. The sale was absolute with a stipulation of a mode of ascertaining the quantity after delivery. The amount was thought to be $8,000.

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The case belongs to that class where a sale is made to defraud creditors in which the fraudulent intent is shared by the vendee. And in this phase it was submitted to the jury by instructions for plaintiffs, and the issue has been found for interpleader. An examination of all the points made satisfies us that the judgment should be affirmed, and it is so ordered. All concur.

MARGARET DUGGAN, Respondent v. THE WABASH WESTERN RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, June 8, 1891.

1. **Appellate Practice:** VERDICT: SET ASIDE: PREJUDICE: REASONABLE AMOUNT. Where a verdict is the evident result of prejudice, partiality or mistake, and not of that calm and considerate weighing of the facts in evidence which should always characterize the deliberations of a jury, the appellate court will not hesitate to interfere; but, in order to do this, the testimony and surrounding circumstances must be such as to raise the strongest inference that such was the case. On the evidence in this case the amount of the verdict is deemed reasonable.

2. **Verdict:** RULE OF INTERFERENCE: EVIDENCE. Whenever, from all the facts and circumstances in evidence, a jury may, without violence to the dictates of reason and common sense, infer a fact on account of its known relation to the facts proved, the court should not interpose its own different conclusion. The evidence in this case is reviewed in the light of the above and other rules in relation to interference with verdicts, and is found sufficient to sustain the verdict in this case. [ELLISON, J., *dissenting* in a separate opinion.]

Appeal from the Jackson Circuit Court.—HON. R. H. FIELD, Judge.

AFFIRMED.

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Geo. S. Grover and *F. W. Lehmann*, for appellant.

There was no evidence to support the verdict. *Stepp v. Railroad*, 85 Mo. 229; *Moore v. Railroad*, 28 Mo. App. 622; *Walton v. Railroad*, 32 Mo. App. 634; *Diel v. Railroad*, 37 Mo. App. 454; *Huhn v. Railroad*, 92 Mo. 440; *Soeder v. Railroad*, 100 Mo. 673.

Botsford & Williams and *Geo. F. Ballingal*, for respondent, argued that the evidence supported the verdict.

SMITH, P. J.—The plaintiff in her petition alleged that she was the widow of Daniel Duggan, who, while in the employment of defendant as night switchman at its yard in Kansas City, Missouri, and engaged in his duty of coupling cars, was necessarily compelled to step on the track of defendant's switch yard, and between and near the cars of defendant's train, and in doing so, without any fault on his part, and by reason of defendant's negligence in not blocking up the frog of said switch track, his foot was caught and firmly held in and between the rails of the track onand a part of the switch, whereon and over which defendant's train was being made up, and by reason thereof he was unable to remove his foot therefrom, and that, while his foot was so caught and held in the frog, the train of cars, so being made up thereon, was by defendant propelled and pushed forward and over the switch and on his body, crushing him beneath the cars and inflicting injuries which caused his immediate death, etc. Plaintiff demanded judgment for $5,000. The answer was a general denial, coupled with the plea of contributory negligence. The plaintiff had judgment for $1,500, and from which defendant has appealed.

I. The principal ground upon which the appealing defendant challenges the judgment is, that the evidence adduced was insufficient to authorize a verdict. The

well-settled rule in this state is, that where the verdict is the evident result of prejudice, partiality or mistake, and not that calm and considerate weighing of the facts in evidence which should always characterize the deliberations of a jury, the appellate courts will not hesitate to interfere. *Spohn v. Railroad*, 87 Mo. 74; *Whitsett v. Ransom*, 79 Mo. 258; *Baker v. Stonebraker*, 36 Mo. 345; *Price v. Evans*, 49 Mo. 396; *Garrett v. Greenwell*, 92 Mo. 120; *State v. Prim*, 98 Mo. 372; *Clark v. Fairley*, 30 Mo. App. 335; *Freeze v. Fallon*, 24 Mo. App. 44. But, in order to do this, the testimony and surrounding circumstances must be such as to raise the strongest inference that such was the case. *Jackson v. Railroad*, 29 Mo. App. 500. In view of the evidence of the age and wage-earning capacity of the deceased, we must think the verdict was exceedingly moderate.

The defendant strenuously insists that the verdict cannot be sustained, unless the facts are established by direct evidence, or by inference naturally and reasonably deducible from such established facts, that the foot of deceased was caught in the frog, and that while in that position he was run over and killed by defendant's train. It is conceded here, that defendant had neglected to block the frogs in its yards as required by statute. R. S., secs. 2627, 2628. The only question of fact which we are now to consider is, was the death of plaintiff's husband occasioned by his foot being caught in the defendant's unblocked frog? It is further conceded that no one saw the deceased at the moment he was injured. Do all the facts and circumstances, established by the evidence, justify the inference that the foot of the deceased was caught in the frog in question? We think this is so, and that it can be demonstrated by a bare reference to the pertinent facts and circumstances of the case. On the night when the plaintiff's husband was last seen alive he was coming down the ladder on the west end of a stock car, to the east end of which was attached a switch engine, which was pushing the car

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westward. He was descending the ladder for the purpose of coupling the stock car, on which he was riding, with a string of cars further west. The ladder was between the bumper and the north side of the car, and directly over the north side of the track. The east end of the cars, to which the coupling was to be made with the stock car, stood about ten or fifteen feet east of and over the frog in which, plaintiff claims, one of her husband's feet was caught while making the coupling. The switch with which this frog was used was distant east about thirty feet. The signal to slow up the engine and stock car, at the point where the coupling was to be made, which was down grade, was tardily given, and the result was an unusually sharp collision when the cars met, moving off the standing cars further west. It is not disputed that, immediately after the cars met, they moved further west without any signal for that purpose being given. If the coupling of the cars was made by deceased, but not at the instant they met, then it must have been done later while they were in motion. If done while they were moving west, it was necessary for him also to move in the same direction, and two or three steps would have brought his feet to the locality of the unblocked frog. No one saw the coupling made. Deceased was ordered to make it, and was last seen descending the ladder of the car as it approached the point where it was to be made, and, as it was subsequently made, the inevitable inference must be that he made it. It appears there were three places in the frog where the foot of the deceased might have been caught, if he walked from where the cars met west to where the frog was located. The shoe that was found on one of his feet was torn around the heel and vamp, and there was also a corresponding laceration of the flesh of the foot. These, with other facts and circumstances, we think, justify the inference that the heel of the deceased was caught in the frog while he was on the railway track for the purpose of making the coupling.

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In *Peck v. Railroad*, 31 Mo. App. 123, it was remarked that, "Whenever, from all the facts and circumstances in evidence, a jury may, without doing violence to the dictates of reason and common sense, infer a given fact on account of its known relation to the facts proved, the court should not interpose its own different conclusion." The verdict in this case can be supported only upon the assumption that the jury inferred from the facts and circumstances proved by the evidence the further fact that the foot of the deceased was caught in the frog, and that this caused his death. In *Frost v. Brown*, 2 Bay (S. C.) 133, it was said that a single circumstance may have little strength, and of itself afford no foundation; but when joined to many more of the same nature, all fitting each other, having the same relation, the whole united may form an arch strong enough to support a presumption of the most important fact. It is a familiar principle of the law of negligence that, whether a person, injured by the negligence of another, was exercising ordinary care, is a question for the jury to determine, either when there is a dispute, or a reasonable doubt, as to the inferences to be drawn from the undisputed facts. Wharton on Neg., sec. 425; *Norton v. Ittner*, 56 Mo. 352; *Mauerman v. Siemerts*, 71 Mo. 105; *Nagel v. Railroad*, 75 Mo. 653; *Wyatt v. Railroad*, 55 Mo. 485. And no reason is perceived why these rules are not applicable in a case like this.

The theory of the defendant, that the deceased came to his death by falling from the ladder of the car on which he was riding, we cannot think the most reasonable one, in view of all the facts and circumstances of the case. Some time after the body of the deceased was found, and after the car on which he was riding when last seen alive had been moved backwards and forwards a number of times, an unlighted lantern answering the description of that used by deceased, was found on the top of the car lying on its side. This, it is contended, is

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a circumstance showing that deceased did not get down from the ladder on the ground to make the coupling, but fell from the car. We do not think this circumstance authorizes this inference. If he had the lantern in his hand or on his arm, and fell from the car, it would have gone down with him. It is quite as probable that, while standing on the ladder preparatory to making the coupling, he set his lantern down on the top of the car to get its reflected light from there while making the coupling. It is not improbable that when the cars collided, or in the subsequent movements, it was turned over and extinguished. The place where the body of deceased was found, the blood stains along the rail on either side of the frog, the wounds on his body, the condition of his shoe, his position on the ladder just preceding the coupling, the coupling made of the cars, and the other facts and circumstances shown by the evidence, we think, furnish a base broad enough and strong enough to support the inference that he came to his death in the manner, and by the means, alleged in the petition. This, it is true, may be the subject of reasonable doubt; at all events it was a question to be solved by the jury, and its determination cannot be interfered with by us. Thompson on Trials, sec. 2290. There was no question of contributory negligence in the case. Secs. 2627, 2628, *supra; Huhn v. Railroad*, 92 Mo. 440. The rules offered in evidence, for this reason, were properly excluded. The instructions given by the court fairly presented the whole law applicable to the case. No error is perceived in the action of the court in refusing the requests of the defendant.

The judgment will be affirmed. Judge GILL concurs; Judge ELLISON dissents.

ELLISON, J. (*dissenting*).—It can serve no useful purpose for me to go into a discussion of details of the facts or law of this case. But a few conceded physical facts, in my opinion, settle the cause against plaintiff.

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It is agreed all round that to establish the case plaintiff must show that deceased (who is an employe) came to be knocked down, run over and killed by getting his foot caught in the frog. Now his body was found *fifteen feet east* of the frog, and the cars were moving *west*. The opening or diverging part of the frog (which may be likened to a boot jack) was to the west, and if the tear on the heel of the shoe was caused by being pulled or forced out of the frog, he must have been knocked down and run over by cars moving east. But it is said that after the cars were brought in to be coupled and had moved on west, they were moved back and forth several times before deceased was discovered to have been killed, and, that though his body was found fifteen feet east of the frog, it was dragged there as the cars came back. This does not explain the matter, for there was no evidence or appearance, in my opinion, of the body having been dragged; and, furthermore, the body was completely severed about the middle, the lower portion lying straight between the rails and the upper portion (lying straight) just outside the north rail, and showing no evidence of having been dragged. If deceased was killed at the frog under the cars fifteen feet away, it is beyond comprehension how the upper portion of his body could be in the condition it was, at the place it was, *outside the rails*.

JACOB MARKT, Respondent, v. WILLIAM F. DAVIS *et al.*, Appellants.

Kansas City Court of Appeals, June 8, 1891.

Nuisance: FLOODING LAND: PERMANENT DAMAGES. In cases of nuisance plaintiff cannot recover for damages not sustained when his action is commenced. When the injury inflicted is of a permanent character and goes to the entire value of the estate, the whole injury is suffered at once, and a recovery should be had therefor

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in a single suit, and no subsequent action can be maintained for the continuance of said injury. But when the wrong done does not involve the entire destruction of the estate, or its beneficial use, but may be apportioned from time to time, separate actions must be brought to recover the damages sustained.

Appeal from the Holt Circuit Court.—HON. CYRUS A. ANTHONY, Judge.

REVERSED AND REMANDED.

Huston & Parrish and *T. C. Dungan*, for appellant.

(1) The court erred in permitting the plaintiff to prove what the injury or damage was to his place in consequence of the alleged overflow. If the injury was permanent, and went to the entire value of the estate, the damages would be the difference in the market value of this land immediately before the injury occurred and immediately afterwards. *Van Hoozer v. Railroad*, 70 Mo. 145–48; *Dickson v. Railroad*, 71 Mo. 575; *Pinney v. Berry*, 61 Mo. 360–67; *Smith v. Railroad*, 98 Mo. 20. (2) The record shows that, for the maintenance of the wrong complained of, other actions may be maintained by the plaintiff, or that the nuisance may be removed or abated. The rule, therefore, above stated does not apply. The loss of rent or the loss of plaintiff's crops, etc., would be the proper element of damages. *Pinney v. Berry*, 61 Mo. 359-67; *Van Hoozer v. Railroad*, 70 Mo. 145; *Dickson v. Railroad*, 71 Mo. 575–79; *Givens v. Van Studdiford*, 86 Mo. 149-159; *Bird v. Railroad*, 30 Mo. App. 365-73; *Offield v. Railroad*, 22 Mo. App. 607; *Brown v. Railroad*, 80 Mo. 457. (3) The division being unlawful, it will not be presumed to continue. *Mfg. Co. v. State*, 11 N. E. Rep. 264–67. The respondent in his petition did not claim any damage for injury to his farm. The court, therefore, erred in admitting any evidence as to such damage. *Brown v. Railroad*, 80 Mo. 457; *Bird v. Railroad*, 30 Mo. App. 365-73.

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L. R. Knowles and *Sam'l O' Fallon*, for respondent.

The right to recover for injuries done to the realty and the growing crops is authorized by the law of this state. *Bird v. Railroad*, 30 Mo. App. 365.

Ellison, J.—This is an action for a nuisance which consisted in erecting a dam across running streams which passed through defendant's lands, and digging a ditch so that the waters were diverted from their natural course in said streams onto plaintiff's land. The petition asked damages for injuries to the crop and to the land. The court's instruction permitted the jury to assess damages for the permanent injury to the land, and also for the loss of the crop. Permanent injury should not have been submitted to the jury.

It is not worth while to say more of this case than that it is governed by the cases of *Pinney v. Berry*, 61 Mo. 359; *Van Hoozer v. Railroad*, 70 Mo. 145; *Dickson v. Railroad*, 71 Mo. 575. In the case last cited it is held that: "In cases of nuisance the rule is well settled, that the plaintiff cannot recover for injuries not sustained when his action is commenced. It is equally well settled, that when the injury inflicted is of a permanent character, and goes to the entire value of the estate, the whole injury is suffered at once, and a recovery should be had therefor in a single suit, and no subsequent action can be maintained for the continuance of said injury. But when the wrong done does not involve the entire destruction of the estate or its beneficial use, but may be apportioned from time to time, separate actions must be brought to recover the damages so sustained."

The judgment will be reversed, and the cause remanded. All concur.

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MARTHA A. HIXON, Respondent, v. JAMES B. SELDERS, Appellant.

Kansas City Court of Appeals, June 8, 1891.

1. **Amendments:** UNLAWFUL DETAINER: VERIFICATION. Amendments are favored, and should be liberally made in furtherance of justice; and there is no impropriety in allowing an amendment changing the amount of damage in the complaint for unlawful detainer, after the jury is sworn, or even after verdict, and no second verification of the complaint after amendment is required.

2. **Forcible Entry:** COMPLAINT: DAMAGES. The statute does not require the complaint in an action of forcible or unlawful entry and detainer to allege a specific claim for damages.

Appeal from the Barton Circuit Court.—HON. D. P. STRATTON, Judge.

AFFIRMED.

McCluer & Bowling, for appellant.

(1) The complaint must be verified by affidavit. R. S. 1889, sec. 5092; *Fletcher v. Keyte*, 66 Mo. 285. (2) In unlawful detainer cases justices of the peace have exclusive original jurisdiction. *McQuoid v. Lamb*, 19 Mo. App. 153; *Bast v. Ketchum*, 5 Mo. App. 433; *Fletcher v. Keyte, supra.* (3) In an action commenced before a justice of the peace under the unlawful detainer act, if plaintiff claim a specific sum as embracing the amount of his damages, judgment on appeal to the circuit court for a greater sum is error. *Moore v. Dixon*, 50 Mo. 424. An affidavit cannot be amended by interlineation or erasure.

H. C. Timmonds, for respondent.

Section 5092, Revised Statutes, requires that the complaint "shall be in writing, signed by the party

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aggrieved, his agent or attorney, and sworn to, specifying the lands, tenements or other possessions so forcibly entered and detained, or unlawfully detained, and by whom and when done." This was all done. *Moore v. Dixon*, 50 Mo. 424; R. S., secs. 5103, 2057; *Elliott v. Abell*, 39 Mo. App. 346.

SMITH, P. J.—This is an unlawful detainer suit, brought by plaintiff to recover from the defendant possession of eighty acres of land in Barton county, Missouri, and damages for withholding the same. The suit was instituted before a justice of the peace, and taken by writ of *certiorari* to the circuit court. The complaint that was filed with the justice, and which was duly sworn to, alleged that plaintiff was damaged in the sum of $50. After the jury was selected and sworn (in the circuit court) to try the case, the plaintiff asked leave to amend her complaint by interlineation, by adding the words "one hundred and," just before the word "fifty" in the *ad damnum* averment of the complaint, so that the allegation as to damages would be $150, instead of $50. The defendant objected to the amendment, but the court granted the request, and the complaint was so amended, defendant saving his exceptions. After the amendment the complaint *was not* sworn to. A trial was then had which resulted in a finding for the plaintiff, the damages being assessed at $84. The defendant then filed a motion for a new trial, and, pending the action on said motion, plaintiff again asked leave to amend, this time by striking out the words "one hundred and," that had before, by leave of the court, been interlined over the objection of the defendant; and, also, the word "fifty" just following said words, so that the complaint would then allege that the plaintiff was damaged in the sum of ——— dollars; the defendant objected to said amendment being made, but the court permitted the same, which was then done, defendant saving his exceptions. After

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the complaint was so amended it was not sworn to. The court then rendered judgment for double the damages assessed by the jury, from which the defendant has appealed.

The single question presented by the record in this case for our decision is, as to the propriety of the action of the circuit court in permitting the two amendments by the plaintiff of her complaint. Amendments are favored, and should be liberally made in furtherance of justice. When a cause is appealed from a justice of the peace to the circuit court it is tried there on its merits, and the only prohibition against making amendment is that the cause of action shall not be changed. *House v. Duncan*, 50 Mo. 453.

There was no impropriety in allowing the amendment, changing the amount in the *ad damnum* averment in the complaint from $50 to $150. *Elliott v. Abell*, 39 Mo. App. 346. After the verdict of the jury was returned, and before judgment had been rendered, it was still within the power of the court to allow any amendment of the complaint which would make it conform to the proof adduced. *McClannahan v. Smith*, 76 Mo. 428. There was no sort of occasion requiring the plaintiff to ask leave to make a second amendment of her complaint. However, by striking out of her complaint the amount of damages she had claimed, she still had left all the essentials necessary to entitle her to recover both the premises and the damages assessed by the jury. The damages assessed were not in excess of the amount named in the *ad damnum* averment after its first amendment, which we have stated was not improper.

Under section 2423, of the statutes, in respect to the action of forcible or unlawful entry and detainer, it is not necessary, in the complaint, to allege a specific claim for damages. *Moore v. Dixon*, 50 Mo. 424; *Feedler v. Schroeder*, 59 Mo. 364. The complaint, as last amended, stood as if no amount of damages were

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claimed therein. Thus amended, it was sufficient under the statute to warrant the verdict and judgment.

It was the constant practice under the practice act of 1855, which required the verification of every petition, answer or replication to make any of the amendments authorized by sections 3, 6, 7, 8, 11 and 14, of article 4, chapter 128, Revised Statutes, 1855, 1252, without a second verification, and we see no reason why a different practice should obtain under the statute in relation to forcible entry and detainer. Amendments like the one in question are allowed by the court on application of the complainant, and the complaint, after such amendment, is to be taken as if it had been originally framed as it appears in its amended form. No reason is discovered why the trial court may not allow an amendment of a complaint to be made by interlineation. No injury could result to the adverse party by this practice.

We can perceive no ground upon which we are authorized to sustain the defendant's appeal. The judgment must be affirmed. All concur.

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CURLESS & CO., Appellants, v. H. D. LEWIS *et al.*, Respondents.

Kansas City Court of Appeals, June 8, 1891.

1. **Mechanics' Lien:** LIEN ACCOUNTS: SUFFICIENCY OF. A lien account which fails to show when the material was furnished is insufficient, as it cannot be determined whether the account is one, and that every portion of it should be included in the lien.

2. ——— : DEFINITIONS : JUST AND TRUE ACCOUNT. "A just and true account" is an itemized account with dates, so that it may be seen from the face thereof that it is one for which a lien may be had.

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Appeal from the Dade Circuit Court.—HON. D. P. STRATTON, Judge.

AFFIRMED.

McCluer & Bowling, for appellants.

(1) The doctrine as to mechanics' liens is that the statute is highly remedial in its nature, and should receive a liberal construction to advance the just and beneficent objects had in view in its passage. *Dewitt v. Smith*, 63 Mo. 263; *Putnam v. Ross*, 46 Mo. 337; *Oster v. Rabeneau*, 46 Mo. 595; *Hayden v. Wulfing*, 19 Mo. App. 353; *Whitford v. Newell*, 2 Allen, 424; *Gallaher v. Karns*, 27 Hun (N. Y.) 375; *Railroad v. Brown*, 14 Kan. 557; *Vandergriff's App.*, 83 Pa. St. 127; *Willamette Co. v. Remick*, 1 Ore. 169; *Winslow v. Urquhart*, 39 Wis. 268; *Hazard Co. v. Byrnes*, 21 How. Pr. 189; *Lumber Co. v. Russell*, 22 Neb. 126; *Rogers v. Hotel Co.*, 4 Neb. 59; *McAdow v. Sturtevant*, 41 Mo. App. 220. (2) A failure to give the dates of the various items does not invalidate the lien. It is sufficient if the statement and affidavit contain everything required by the statute. *Hayden v. Wulfing*, 19 Mo. App. 353; *Pool v. Wedemeyer*, 56 Tex. 287; *Simmons v. Carrier*, 60 Mo. 581. (3) This lien account is not open to the objection that it embraces "lumping charges." *McLaughlin v. Schwacker*, 31 Mo. App. 365; *Hayden v. Wulfing*, 19 Mo. App. 356.

John B. Cole, for respondent.

(1) The time of filing the lien may be computed from the date of the last item of the account. In the case at bar, there is not a single date given as a basis for computation. *Schmeiding v. Ewing*, 57 Mo. 80, 81; *Livermore v. Wright*, 33 Mo. 31; *Stine v. Austin*, 9 Mo. 558; *Viti v. Dixon*, 12 Mo. 482; *Steamboat v. Behler*, 12 Mo. 479; *Gouss v. Hussman*, 22 Mo. App.

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120; *Peck v. Bridewell*, 10 Mo. App. 525. (2) "A just and true account shall contain all the various items and dates that go to make it up, for this is the accustomed meaning of the word." *Coe v. Ritter*, 86 Mo. 286; *Bradish v. James*, 83 Mo. 313; *Miller v. Whitelow*, 28 Mo. App. 642; *Heinrich v. Carondelet Society*, 8 Mo. App. 587. There is no hardship in requiring the lienor to verify and file an account which comes within the ordinary meaning of the term. *Rude v. Mitchell*, 97 Mo. 374.

ELLISON, J.—This action is to enforce a mechanics' lien on the following account filed with the circuit clerk:

"LAMAR, MISSOURI, July 16, 1888.

"*J. S. Lewis to Curless & Co., Dr.:*

To 659, and 13-33 perch of stone, furnished on the ground at 68 cts. per perch	$450 00
To 104 perch of stone, furnished at 80 cts. per perch	83 20
To 298 feet dimension stone at 10 cts. per foot	29 85
"Total	$563 05
By payment on account	357 00
And to balance due	$206 05

The affidavit attached thereto gave no dates, but stated that the "said demand accrued within six months prior to the filing of this lien." The circuit court refused to admit this lien paper in evidence, and gave judgment for defendants. Plaintiffs appeal.

The court's action was proper. The account should have shown when the material was furnished. We cannot accept the date, July 16, 1888, as being the date at which the account accrued, from the fact that the lien was filed with the clerk on April 25, so that the account, of course, must have been made up before that time, which excludes the idea that the date at its head was

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intended as anything more than the time when it was made out. The statute requires a just and true account to be filed as a foundation of the lien. This means that the account must give the items and dates, and the fact that the affidavit may show that the account accrued within six months does not make the account as such, any more specific, unless it be the last item thereof. The statement that the account accrued within six months at best is merely that the last item was furnished within six months. The other items might cover a long space of time, and if the dates were given it might appear upon the face that the account was not one account, and that a portion of it should not be included in the lien. If there should be other incumbrances it might be of great practical importance to know the dates of the items so as to settle priorities. In *Coe v. Ritter*, 86 Mo. 286, it became necessary to settle which was prior, a mechanics' lien, or a deed of trust, and it was determined by the date of the first items of the account.

There can be no doubt that the ordinary meaning of the statutory expression, "a just and true account," is an itemized account, with dates.

If an individual demands a true and just account, there is no doubt but it would be expected he was to get one with items and dates. It has been decided that the statutory account must be such a one as that "it may be seen from the face" thereof that it is one for which a lien may be had. *Rude v. Mitchell*, 97 Mo. 365; *Coe v. Ritter*, 86 Mo. 277. In the latter case, though this precise point was not before the court, yet the court says, that the accustomed meaning of the words, "a just and true account," is that it shall contain the various items and dates which go to make it up. See also *Bradish v. James*, 83 Mo. 316 It follows that the judgment should be affirmed. All concur.

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J. R. WELSH, Respondent, v. R. C. EDMISSON, Appellant.

Kansas City Court of Appeals, June 8, 1891.

1. **Evidence:** VARYING WRITTEN INSTRUMENT: IDENTIFYING SUBJECT-MATTER OF CONTRACT. While parol evidence cannot be admitted to contradict or vary the terms of a written contract, yet such evidence is competent to identify the subject-matter of the contract, where the instrument is alike applicable to several persons, matters or things, or the terms are vague and general, not definitely identifying the subject-matter of the contract. So, parol evidence is admissible to show that a given note was not embraced in the general terms of an assignment made by a partnership of all its notes and accounts, but that the interest of the partnership in such note had been extinguished before the assignment.

2. **Instructions:** IGNORING ISSUE. An instruction that ignores a material issue of fact made by the pleadings is error.

3. **Evidence:** ASSIGNMENT: LIST OF NOTES: PAROL TO CONNECT. Although an assignment of notes and accounts, and a list of notes, do not refer to one another, it may be shown by parol evidence that the latter was made contemporaneously with the former as a part of it, and it may be introduced to identify the subject-matter of the assignment.

Appeal from the Dallas Circuit Court.—HON. W. I. WALLACE, Judge.

REVERSED AND REMANDED.

John S. Haymes, for appellant.

(1) The testimony offered by defendant, and rejected by the court, was admissible. The assignment says, "all my interest in the partnership notes, etc., which belonged to us while in business together." A note to be conveyed had to possess the compound quality of coming within both of these requirements at

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the time of the conveyance. If it was wanting in either it was not conveyed. The use of the words "interest in" and "partnership notes" show that only notes "due the firm" were intended to be conveyed. The petition recognizes this. This evidence would have shown whether the Bridges note was a partnership note and to whom it was due. The assignment does not say this was a partnership note. Then, certainly, this evidence would not have varied it, but would have applied it to its subject-matter. *Philibert v. Burch*, 4 Mo. App. 470; *Amonett v. Montague*, 63 Mo. 201. It was clearly admissible to meet one of the issues made by the pleadings. The petition alleges that plaintiff "purchased defendant's interest in all notes and accounts due the firm," and that among these was the Bridges note, and having thus sued he cannot disregard his own pleadings and recover on a different theory. *Weil v. Posten*, 77 Mo. 284; *Waldheir v. Railroad*, 71 Mo. 514. (2) The first instruction asked by defendant should have been given. There was no pretense that the Bridges note was included in the written list transferred. (3) The third instruction should have been given. Both the assignment and list of notes are to be construed together. 2 Par. on Cont. [7 Ed.] 503; *Lewis v. Ins. Co.*, 3 Mo. App. 372; *Railroad v. Atkinson*, 17 Mo. App. 484; *Sexton v. Anderson*, 95 Mo. 373; 1 Wait's Act. & Def., p. 122, sec. 12, and cases cited. "And the rule is the same when such instruments are executed at different times." 1 Wait's Act. & Def., sec. 12, p. 123, and cited cases. (4) Instructions, numbered 5 and 6, should have been given. They covered the exact issues made by the pleadings.

Engle & Scott, for respondent.

(1) The testimony offered by the defendant was, therefore, properly excluded. The contract of assignment is unambiguous and complete in itself. Parol

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testimony is inadmissible to contradict, add to, detract from or vary the terms of such a contract. 1 Greenl. Ev., secs. 275, 276, 277; *County v. Wood*, 84 Mo. 489; *Wislizenus v. O'Fallon*, 91 Mo. 184; *Pearson v. Carson*, 69 Mo. 550; *Miller v. Dunlap*, 22 Mo. App. 97; *State ex rel. v. Hoshaw*, 98 Mo. 358; *Keohring v. Meumminghoff*, 61 Mo. 403; *Huse v. McQuade*, 52 Mo. 388; *Murdock v. Gauahl*, 47 Mo. 135; *Massuean v. Holscher*, 49 Mo. 87; *Woodward v. McGaugh*, 8 Mo. 161. Where a contract is claimed to be contained in several papers, oral testimony is inadmissible to show what papers are referred to; this must appear on the face of the document itself. The assignment in this case is complete in itself, and refers to no other papers. *Scarritt v. Church*, 7 Mo. App. 175, and the cases above cited. Authorities cited by counsel for defendant are not in point. (2) The instructions given by the court correctly declared the law to the jury. There was no legal testimony upon which to base instructions asked by defendant. *Weaver v. Hendrick*, 30 Mo. 502.

SMITH, P. J.—The petition of the plaintiff alleged that the partnership relation existing between plaintiff and defendant was on October 12, 1886, dissolved, and that the defendant for a valuable consideration sold and assigned to plaintiff his interest in all notes and accounts due the firm; that among them was the note of one Bridges, secured by chattel mortgage for $168.45; that defendant, notwithstanding the said sale and assignment to plaintiff, collected said note and refused to pay over the same to plaintiff, etc. The answer of the defendant admitted, *first*, the partnership and its dissolution; *second*, the sale and assignment, and, *third*, the collection of the Bridges note, but denied, *first*, the sale of his interest in said note to plaintiff, and, *second*, claimed title thereto in himself. It will be seen that the issues thus made by the pleadings were, *first*, whether the Bridges note was included in the sale

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and transferred by defendant to plaintiff, and, *second*, whether the defendant was the sole owner of the note at the time he collected it. At the trial the defendant offered to testify: *First*. That the note mentioned in the plaintiff's petition as being collected by defendant was not a partnership note of Welsh & Edmisson, at the time the certificate of assignment mentioned in the petition was executed. *Second*. That plaintiff and defendant prior to the execution of said certificate of assignment, and prior to the dissolution of the partnership between them, by mutual agreement, divided a portion of the notes and accounts due the firm, and that each member took a portion thereof as his sole and individual property; that, among others, the note collected from Bridges was taken by the defendant, by and with the consent of the plaintiff, as his sole and individual property, and so remained his sole and individual property until the same was collected by defendant. *Third*. That the plaintiff never, after the taking of said note by defendant as aforesaid, had said note in his possession or had any interest therein. To all of this evidence the plaintiff objected, for the reason that parol testimony cannot be offered to vary a written instrument. The objection was sustained by the court and the evidence excluded, and the defendant at the time excepted.

In determining whether defendant is entitled to a reversal of the judgment on account of the action of the court in rejecting his offer of this evidence, we are obliged to assume that he was able to prove what he offered to prove. *Funk v. Gallware*, 49 Conn. 124. The rule is elemental that parol evidence cannot be admitted to contradict or vary the terms of a written contract. *Clark v. Diffenderfer*, 31 Mo. App. 232. So the rule is well settled that oral testimony is inadmissible to vary the terms of a written contract which are clear, precise and unambiguous and embrace the entire

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agreement of the parties. *Miller v. Dunlap*, 22 Mo. App. 97.

And so, too, it has been decided that, where a contract in writing purports to cover the entire transaction, evidence as to the terms of a prior oral contract is inadmissible. *Railroad v. Cleary*, 77 Mo. 634; *Turner v. Railroad*, 20 Mo. App. 632. Here it is alleged that the defendant sold to plaintiff "all notes and accounts due the firm." These terms are general, and are not specific. They do not expressly name the Bridges note. The question, therefore, is, would it be an infringement of these rules to admit parol evidence to ascertain whether the Bridges note was included in the assignment. Mr. Greenleaf in his work on evidence, section 286, fourteenth edition, states it to be a leading rule in regard to written instruments, that, since they are to be interpreted according to their subject-matter, it is obvious that parol or verbal testimony must be resorted to in order to ascertain the nature and qualities of the subject to which the instrument refers.

Evidence which is calculated to explain the subject of instrument is essentially different in its character from evidence of verbal communications respecting it. Whatever, therefore, indicates the nature of the subject is a just medium of interpretation of the language and meaning of the parties in relation to it, and is also a just foundation for giving the instrument an interpretation, when considered relatively, different from that which it would receive if considered in the abstract. Thus, when certain premises were leased including a yard, described by metes and bounds, and the question was whether a cellar under the yard was or was not included in the lease, verbal evidence was held admissible to show that, at the time of the lease, *the cellar was in the occupancy of another tenant, and, therefore, it could not have been intended by the parties that it should pass by the lease.* So, where a house or mill or factory is conveyed *eo nomine*, and the question is as to

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what was part and parcel thereof, and so passed by deed, parol evidence to this point is admitted. So, if a contract in writing is to extend the time of payment of "certain notes" held by one party against the other, parol evidence was admissible to show what notes were held and intended. Greenl. Ev., sec. 287. And this author, section 288, further states the rule to be that when the language of an instrument is applicable to several persons, to several parcels of land, to several species of goods, to several monuments or boundaries, to several writings, or the terms are vague and general, etc., in these and all like cases parol evidence tending to show what persons or things were intended by the party, or to ascertain the meaning in any other respect, and this without any infringement of the rule which excludes parol evidence declaring its meaning than that which is contained in the instrument itself.

In this state the rule is stated to be, that the identity of the subject-matter of the contract not being definitely ascertained by its terms parol testimony is admissible to make it certain. *Amonett v. Montague*, 63 Mo. 201; *Philibert v. Burch*, 4 Mo. App. 470. From these authorities it is quite plain that the court erred in rejecting the defendant's offer of evidence. The court should, under the issues, have received parol evidence tending to show that the Bridges note was not embraced in the general terms of the assignment. Or, in other words, that at the time of the assignment it was not a *chose* of the partnership, or that the plaintiff had previously made a valid sale and transfer of his interest in it to defendant. Any evidence tending to show that the interest of the partnership in it had been extinguished before the assignment was admissible.

As this case will be remanded for further trial, it may be proper to remark that the instruction given by the court was erroneous in that it ignored a material issue of fact made by the pleadings. It should have left it to the jury to find whether or not under the

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evidence the defendant had sold and transferred the Bridges note to the plaintiff. The assignment shows no reference to, or connection with, the list of notes mentioned in the evidence. The latter is not *prima facie* admissible in evidence as a part of the former. There is no reference in either to the other. *Scarritt v. M. E. Church, South*, 7 Mo. App. 174; *Railroad v. Atkinson*, 17 Mo. App. 484. But no reason is perceived why parol testimony may not be received to show that the list of notes was made contemporaneously with the assignment as a part of it. It may be introduced to identify the subject-matter of the assignment. This will not encroach upon the rule laid down in 17 Mo. App., *supra*, for the reason that it was there held the statute of fraud forbade the giving of parol evidence, to identify the property referred to in the contract. Here no such objection can be interposed to the introduction of such testimony. It may be remarked further that no reason is perceived why the third, fifth and sixth instructions asked by defendant should not have been given by the court.

The judgment is reversed and cause remanded. All concur.

JOHN B. BALDWIN, Respondent, v. J. F. FRIES, Appellant.

Kansas City Court of Appeals, June 8, 1891.

1. **Slander:** WORDS CHARGED V. WORDS PROVED: RULE: INSTRUCTION. The rule is, that the slander proved must substantially correspond with that charged in the petition. The words that contain the poison to the character and impute the crime must be proved as laid; and an instruction requiring the jury to believe from the evidence that the defendant spoke the words charged in the petition, "or enough of said words to constitute the charge that plaintiff was a thief," etc., is proper enough.

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2. ——: PUNITIVE DAMAGES: CONSTITUTION: INSTRUCTION. An instruction telling the jury that it might not only allow actual damages, but also such damages as will afford a wholesome example to others in like cases in the way of smart money or exemplary damages, etc., does not conflict with the constitutional provision that all penalties and forfeitures shall go into the school fund.

3. ——: ——: CRIMINAL PROCEEDING: TWICE IN JEOPARDY: INSTRUCTION. In an action for slander an instruction authorizing punitive damages is not in conflict with the common-law maxim, *Nemo debet bis vexari pro eadem causa*, embodied in our bill of rights, to the effect that no one shall be twice in jeopardy of life or limb, by reason of the fact that defendant may be, or has been, criminally prosecuted for the same slander.

4. **Damages**: PUNITORY OR EXEMPLARY: CRIMINAL PROSECUTION: MITIGATION. Damages allowed in a civil case by way of punishment have no necessary relation to the penalty incurred for the wrong to the public, but are called punitive by way of distinction from pecuniary damages to characterize them as a punishment for the wrong done the individual; and, in a civil suit to recover such damages, the fact that a penalty for the act has been inflicted in a criminal prosecution can in no way influence the damages in the civil action; though in such criminal prosecution the jury, in assessing the punishment, would be influenced by the fact that the party wronged had recovered vindictive damages for the same injury, and the verdict in the civil case can be introduced for the purpose of such mitigation.

5. **Slander**: EXEMPLARY DAMAGES: MALICE: INSTRUCTIONS. An instruction, that if the jury believe that the defendant spoke the slanderous words charged in the petition, or enough of them to constitute the charge, that plaintiff was a thief, the law presumed malice in the speaking, and the jury without proof of malice or special damages were at liberty to give exemplary damages, is approved.

6. ——: PLEADING JUSTIFICATION: MITIGATION: EVIDENCE. Where neither justification nor mitigation is pleaded, evidence of mitigating circumstances is inadmissible.

7. ——: WORDS NOT CHARGED: REFUSED INSTRUCTION: HARMLESS ERROR. The refusal of an instruction that plaintiff could not recover on account of words shown in evidence, and not charged in the petition, is error; but in this case it is harmless error by reason of other evidence.

Appeal from the Jasper Circuit Court.—HON. M. G. McGREGOR, Judge.

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AFFIRMED.

Crow & Robinson and *Harding & Buller*, for appellant.

(1) The court erred in giving the first instruction asked by plaintiff. The instruction was misleading. Proof of words of similar import amounting to the same thing is not sufficient, and though the phrase, "enough of said words to constitute the charge," is used, that is more than neutralized by the instruction telling them that they should consider all of the conversation and the facts and circumstances detailed in evidence. *Birch v. Benton*, 26 Mo. 153; *Atteberry v. Powell*, 29 Mo. 429. And the explanatory instructions given for defendant do not cure the error. *Jones v. Tolbert*, 4 Mo. 279. (2) In view of the mass of evidence tending to show that the conversation was to the effect that the Baldwins were stealing the corn, and that John Baldwin was stealing the corn to get boot on a horse swap, the court should have given defendant's instruction excluding such evidence. It was clearly incompetent. *Birch v. Benton, supra.* But, instead of excluding it, the court invited the attention of the jury to it, and told them to consider all of it. (3) The instructions to the jury to give exemplary damages by way of punishment as a wholesome example to deter others was wrong, as being in conflict with the constitution, which provides that the proceeds of all penalties and forfeitures should go to the school fund. Const., art. 11, sec. 8; *Railroad v. State*, 22 Kan. 1; R. S., sec. 1590; *Lynch v. St. Economy*, 27 Wis. 69. (4) That instruction was also erroneous in this, that it told the jury that they must give exemplary damages if they believed the defendant spoke the words alleged, unless just cause or excuse for speaking them had been shown, and that in this case no just cause or excuse had been shown. (5) If the question of malice was in issue then this instruction was erroneous in this,

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that it took the determination of that question away from the jury, and told them that, if the slanderous words were spoken, they were spoken maliciously, unless the evidence showed that the defendant had given good cause or excuse, and that no excuse had been shown, and, therefore, they must make an example of the defendant by mulcting him in vindictive damages. As to whether the words were spoken with a malicious intent and mischievous effect, the jurors must be the judges. *Church v. Bridgman*, 6 Mo. 192. And if there is the least particle of evidence, whether direct or inferential, however slight it may be, the jury should be permitted to pass upon it. *Morse v. Maddox*, 19 Mo. 451; *Houghtaling v. Ball*, 19 Mo. 84; *Emerson v. Sturgeon*, 18 Mo. 170; *Rippey v. Forede*, 26 Mo. 523; *McFarland v. Bellows*, 46 Mo. 311; *Benton v. Klein*, 42 Mo. 97; *Owens v. Rector*, 44 Mo. 389. And in slander cases the jurors are peculiarly the judges both of the law and facts. Const., art. 11, secs. 7, 14. And confidential communications made in domestic intercourse are not slander, unless express malice is shown. 2 Greenl. Ev., sec. 421, note 2 on p. 417, and cases cited.

J. R. Shields, for respondent.

(1) The evidence under the instructions of the court fully justified and sustained the verdict of the jury. This being a slander suit based on the charge by the defendant that the plaintiff was a thief, and that he was guilty of stealing corn from the pen of James McCall, made the offense charged in the petition actionable *per se*, and no allegations of special damages were necessary. *Goetz v. Ambs*, 27 Mo. 28; *Fairdenheit v. Edmunson*, 36 Mo. 226; *Buckley v. Knapp*, 48 Mo. 152; *Boogher v. Knapp*, 76 Mo. 457; *Noeninger v. Vogt*, 88 Mo. 589; *Lewis v. McDaniel*, 82 Mo. 577; *Mix v. McCoy*, 22 Mo. App. 488. (2) All the instructions given by the court declared the law in this case, and the

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principles announced by them are fully supported by the authorities, *supra.* (3) The law in this state has never been otherwise than to allow exemplary damages in such cases. *Johnson v. Dispatch Co.*, 2 Mo. App. 565, and authorities, *supra.* (4) On the proof of words actionable in themselves having been spoken, malice is presumed, and does not have to be proven. *State v. Boogher*, 3 Mo. App. 600; *Wood v. Hilbish*, 23 Mo. App. 389, and cases cited, *supra.* (5) It is not necessary that all of the slanderous words charged in the petition be proven to have been spoken by the defendant. It is sufficient if enough of said words therein charged to constitute the allegation, "that the plaintiff was a thief; that plaintiff had stolen corn out of the pen of James McCall," were spoken by the defendant as alleged in the petition. *Lewis v. McDaniel*, 82 Mo. 577; *Noeninger v. Vogt*, 88 Mo. 589.

Smith, P. J.—This is an action of slander. The slanderous words, alleged in the petition to have been spoken by the defendant, are, "he (meaning plaintiff stole corn out of the pen of James McCall." "He (meaning plaintiff) is a thief." The answer was a general denial. The plaintiff had judgment, and defendant appealed.

I. The defendant complains of the action of the court in giving so much of the plaintiff's instruction as told the jury that, if it believed from the evidence that the defendant spoke the words charged in the petition, "*or enough of said words to constitute the charge that the plaintiff was a thief*," *etc.*, the verdict should be for plaintiff. The rule is that the slander proved must substantially correspond with that charged in the petition. By this it is not to be understood that, if certain words are employed to convey a slanderous imputation, these words will support a charge containing the same imputation in different words. The meaning of the rule seems to be that, if the words of the charge are proved,

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but with the omission or addition of others not all varying or affecting their sense, the variance will not be regarded. Although the words proved are equivalent to the words charged in the petition, yet, not being the same in substance, an action cannot be maintained; and, although the same idea is conveyed in the words charged and proved, yet not substantially the same words, though they contain the same charge, but in different phraseology, the plaintiff is not entitled to recover. The words that contain the poison to the character, and impute the crime, must be proved as laid. *Casey v. Aubuchon*, 25 Mo. App. 91; *Berry v. Dryden*, 7 Mo. App. 322; *Birch v. Benton*, 26 Mo. 153; *Atteberry v. Powell*, 29 Mo. 429; *Noeninger v. Vogt*, 88 Mo. 589; *Lewis v. McDaniel*, 82 Mo. 577. The instruction in question, declaring that the jury must find that defendant spoke the exact words charged in the petition, or enough of such words as to constitute the charge that plaintiff was a thief, seems to be no invasion of the rule just stated. The plain meaning of this, as we take it, is that the defendant must be found to have given utterance to the words containing the poison as charged in the petition. It is not required to be found that all of such words were employed, but enough of them to constitute the imputed crime.

II. The defendant's further complaint is, that plaintiff's second instruction, which informed the jury that if it found for the plaintiff that it might not only allow actual damages, but, "also, such damages as will afford a wholesome example to others in like cases in the way of smart money or exemplary damages, not to exceed $5,000 in all, provided the jury further believes from the evidence that the charge was made and words spoken by defendant of plaintiff knowingly, without just cause or excuse, and in this case no just cause or excuse has been shown," conflicts with the constitution of this state in two particulars: *First*. Because the common law, authorizing punitory damages, is repealed by section 8,

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article 11, and, *second*, that inasmuch as the statute of this state, Revised Statutes, 1879, section 1590, declares it to be a misdemeanor, punishable by imprisonment or fine or by both, for any person to falsely and maliciously accuse another of any felony, the commission of which would subject him to disfranchisement and other degrading penalties, that the allowance of punitive damages in this case was violative of the principle contained in the twenty-third section of our "Bill of Rights." As to the first of the objections, it is perhaps sufficient to remark, that the constitutional provision therein referred to has no application to a case of this kind. The penalties and forfeitures therein mentioned are only those accruing to the public. *Scott v. Railroad*, 38 Mo. App. 523; *Barnett v. Railroad*, 68 Mo. 57. And as to the second ground of defendant's objection, it may be perhaps conceded, that the principle of the common law, *nemo debet bis vexari pro eadem causa*, is embodied in our state constitution to the extent that no one shall be put twice in jeopardy of life or liberty. But it is not perceived that the principle of this constitutional prohibition as limited by its very terms has the slightest application to a case of this nature. If, in a prosecution under the statute for a criminal slander, the accused should be found guilty and sentenced to pay a fine as a part of his punishment, could he, in a civil action against him for the same slander, plead the judgment in the criminal case as a bar to the recovery of punitory damages? Would such a case fall within the constitutional principle forbidding any one to be put twice in jeopardy of life or liberty? Certainly no one would seriously contend that this would be so. Vindictive or punitory damages may be given when the elements of malice, violence, oppression or wanton recklessness mingle in the controversy. *Kennedy v. Railroad*, 36 Mo. 361; *McKean v. Railroad*, 42 Mo. 79; *Green v. Craig*, 47 Mo. 90; *Stoneseifer v. Sheble*, 31 Mo. 243; *Goetz v. Ambs*, 27 Mo. 28.

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In Massachusetts, Indiana and, perhaps, in other states, the rule does not apply in cases when the act is punishable by the criminal laws of the state. *Austin v. Wilson*, 4 Cush. 273; *Tabor v. Hutson*, 5 Ind. 322. In New York it has been held that punitive damages are given as a punishment, and may be given whether the act is criminally punishable or not. The defendant in the criminal case may procure a suspension of the judgment until the civil case is tried, and then avail himself of the verdict in the civil case by way of mitigation of the penalty in the criminal case. *Cook v. Ellis*, 6 Hill, 466. In *Corwin v. Walton*, 18 Mo. 72, it was held that, "in assessing the punishment the courts would regard the fact that the person injured had recovered exemplary damages for the wrong done, and so the jury, who by statute have succeeded to the power of the courts in assessing the punishment after a conviction, would be influenced by the fact that the party wronged had recovered vindictive damages for the same injury. It would appear, then, that the damages of the party aggrieved, in his action for the wrong done him, were not liable to be affected by anything done in the public prosecution. The punishment inflicted may be affected by the verdict in the civil action, *but the damages to be recovered in the private suit are wholly uninfluenced by anything that may have transpired in the prosecution carried on by the state.*" *Cole v. Tucker*, 6 Texas, 266; *Wilson v. Middleton*, 2 Cal. 54. It is stated in the very able and elaborate opinion of Mr. Justice COLE, in *Hendrickson v. Cole*, 21 Iowa, 379, that the clear weight of authority is with the rule as laid down in *Chetis v. Drake*, 2 Metc. (Ky.) 146, in substance, that the damages allowed in a civil case by way of punishment have no necessary relation to the penalty incurred for the wrong to the public; but are called punitive damages by way of distinction from pecuniary damages, and to characterize them as a

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punishment for the wrong done the individual. In this view the awarding of punitive damages can, in no just sense, be said to be in conflict with the constitutional or common-law inhibition against inflicting two punishments for the same criminal act. While the rulings of the courts are not entirely uniform in respect to the application of the rule allowing punitive damages for an act which is made punishable by statute, it seems to have been long settled in this state that, in a civil suit to recover such damages, the fact that a penalty for the act has been inflicted in a criminal prosecution can in no way influence the damages in the civil action. As such damages are for the wrong done to the individual, and have no relation to the wrongs done to the public, the objection of the defendant to the instruction, the substance of which was stated in the first part of this paragraph, cannot be sustained.

Nor was this instruction erroneous in declaring that, if the jury believed the defendant spoke the slanderous words charged in the petition, or enough of them to constitute the charge that plaintiff was a thief, that the law presumed malice, and that they were spoken maliciously, and that it was not necessary to prove express malice or special damages, etc. It is not necessary to prove malice when words are actionable *per se*, as is the case here. The words being slanderous of themselves, the law implied malice. *Wood v. Hilbish*, 23 Mo. App. 389; *Hill v. Adkins*, 59 Mo. 148; *Pennington v. Meeks*, 46 Mo. 220. And, without proof of actual malice, the jury were at liberty to give plaintiff such exemplary damages as they believed it proper for them, under all the circumstances. *Wood v. Hilbish*, *supra*; *Pennington v. Meeks*, *supra*; *Lanniers v. Pub. Co.*, 20 Mo. App. 12; *Weaver v. Hendrick*, 30 Mo. 502; *Buckley v. Knapp*, 48 Mo. 162.

IV. There was neither justification nor mitigation pleaded. Mitigating circumstances, under the statute, section 3553, may be pleaded and are admissible in

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evidence to reduce the amount of the damages, but not to defeat the action. There being neither justification nor mitigation pleaded, evidence of mitigating circumstances was inadmissible. *Coe v. Reggs*, 76 Mo. 619; *Trimble v. Foster*, 87 Mo. 49. An instruction based upon this defense would have been improper.

V. The defendant further complains of the action of the court in refusing the third instruction asked by him, which told the jury that if they believed, from the evidence, that defendant said, in the presence of others, that the Baldwins were stealing corn, or that John Baldwin was taking his corn to get even in a horse swap, that, these words not having been charged in plaintiff's petition, he cannot recover on account of the speaking of them. This instruction should have been given, but, as there was other evidence before the jury to justify their finding that the words charged in the petition were spoken, we cannot discover that the refusal to give it was harmful to the defendant, or affords any ground for reversal.

The judgment must be affirmed. All concur.

DANIEL J. COLLINS, Respondent, v. MORRIS GLASS, Appellant.

Kansas City Court of Appeals, June 22, 1891.

1. **Master and Servant**: DISCHARGE: TRIAL PRACTICE: EVIDENCE IN REBUTTAL. In an action for breach of contract in discharging the servant without cause, the master set up the incompetency and drunkenness of a servant as a defense, and his evidence tended to show that the servant was drunk most all of the time. It was proper, therefore, for the servant to show in rebuttal by witnesses that the plaintiff was sober at such times as they saw him.

2. ——— : TRIAL PRACTICE: VARIANCE. This suit was to recover wages due under the contract, and there was no room for the application of the rule that there can be no recovery on a contract other than that declared on.

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8. **Appellate Practice:** AMENDMENT: DISCRETION OF TRIAL COURT. The statutes in relation to amendments are liberal; and appellate courts will not interfere with the discretion of the trial courts, except in cases of manifest abuse; especially where the amendment is immaterial, and the court offered to continue the cause, and the defendant elected to proceed.

4. **Trial Practice:** REPLY, WHEN FILED. There was no error in this case in permitting the plaintiff to file his reply after he had rested his case on the evidence.

5. **Master and Servant:** ACTION FOR DISCHARGE: PROCEDURE: DEFENSE: BURDEN OF PROOF. In an action for the unreasonable discharge of a servant, the plaintiff does not have to plead and prove his sobriety. Drunkenness is matter of defense, and the matter of establishing it is upon the defendant; and the rule as to parties occupying confidential relations does not apply.

6. **Verdict:** SMALL FINDING PREJUDICIAL ERROR. The fact that the amount of the verdict might have been greater, under the evidence, is not prejudicial to the defendant in this case.

Appeal from the Jackson Circuit Court.—HON. JAMES GIBSON, Judge.

AFFIRMED.

F. V. Kander, for appellant.

(1) When the discharge of a servant is justified on the grounds of his having been intoxicated, and evidence is produced tending to show intoxication during the hours of his service, evidence that others had seen him sober at other times during his hours of service is immaterial, either as evidence in chief or in rebuttal. *Suttie v. Aloe*, 39 Mo. App. 38-40; *Coale v. Railroad*, 60 Mo. 227-232; *Lester v. Railroad*, 60 Mo. 265; *Chambers v. Hill*, 34 Mich. 523. And that the error was prejudicial to the defense is clear. *Suttie v. Aloe*, 39 Mo. App. 38-40; *Clark v. Fairley*, 30 Mo. App. 335-340. (2) The contract admitted in evidence was not the one set out in the petition. Plaintiff cannot declare on one contract, and recover on another. *Sumner v. Rogers*,

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90 Mo. 324; *Carson v. Cummings*, 69 Mo. 325; *Price v. Railroad*, 40 Mo. App. 189-195. (3) To permit a party in the midst of a trial to amend his pleadings by inserting a material allegation, and perhaps compel a continuance, without some evidence of mistake or inadvertence, would be at variance with both the spirit and the letter of the statute. *Machine Co. v. Philbrick*, 70 Mo. 646-648. (4) The answer set up a complete, affirmative defense, and no reply was filed; after the plaintiff had rested his case and defendant had asked for judgment on the pleadings, the court permitted respondent to file his reply and introduce evidence under it; there was no pretense, even, that the failure to file the reply was caused by accident or mistake. *Ennis v. Hohan*, 47 Mo. 513-515; *Rhine v. Montgomery*, 50 Mo. 566-568. (5) The court erred in ruling that the burden was not on the plaintiff to show his sobriety and competency. Plaintiff alleged and should have proved it. *Bogie v. Nolan*, 96 Mo. 95; *Clifton v. Sparks*, 25 Mo. App. 383-387; *Feurt v. Ambrose*, 34 Mo. App. 360-366. (6) The verdict was contrary to all the evidence. The evidence shows that the plaintiff was entitled to something over $300, if he was entitled to anything. *Brewery Co. v. Rodeman*, 12 Mo. App. 573; *Rottmann v. Pohlman*, 28 Mo. App. 399-407; Thompson on Trials, sec. 2606.

I. J. Ringolsky, for respondent.

(1) The condition of respondent as to sobriety was the only issue in this case, made both by the pleadings and the evidence, and it was clearly admissible to show by witnesses, some who saw respondent while on duty in the morning, others in the evening and others at night, the condition of respondent with reference to sobriety, competency and conduct toward those patronizing appellant's place of business. *Haynes v. Christian & Roberts*, 30 Mo. App. 198, 203; *Miller v.*

Miller, 14 Mo. App. 418-423; *O'Bryan v. O'Bryan*, 13 Mo. 16. If error at all in this case, the same was harmless. *Miller v. Miller, supra; McDermott v. Barnum & Moreland*, 19 Mo. 204-210. (2) In answer to the second point raised by appellant in his brief, that the contract admitted in evidence was not the one set out in the petition, we have only to say that the ruling of the court was in accordance with Revised Statutes, section 2096; *Wetzell v. Waggoner*, 41 Mo. App. 509-515. (3) The fact that the court permitted the plaintiff to amend his petition justifies the conclusion that the court found that here was valid reason for permitting the respondent to amend the same. Furthermore, the amendment was not necessary or material and was properly allowed. *Wetzell v. Waggoner*, 41 Mo. App. 509-515. (4) The appellant by going to trial, permitting a jury to be selected, allowing the respondent to introduce a long list of witnesses to establish the allegations of his petition, just as if a reply had been filed by the respondent, was sufficient ground for permitting the court to allow the respondent to file his reply after his evidence was all in and he had rested his case. *Henslee v. Cannefax*, 49 Mo. 295; *Meader v. Malcolm*, 78 Mo. 550; *Kirkwood v. Cairns*, 40 Mo. App. 631-634. (5) The burden of proof is on the appellant to show that he had good cause for discharging respondent. *Koenigkramer v. Glass Co.*, 24 Mo. App. 124; *Green v. Washburn*, 17 Allen (Mass.) 390; *Miller v. Boot & Shoe Co.*, 26 Mo. App. 57. (6) It was the province of the jury under the instructions given, not only on behalf of the respondent, but also on behalf of the appellant, to bring in any amount they thought all the evidence and circumstances justified. *Layson v. Wilson*, 37 Mo. App. 636-640; *Miller v. Boot & Shoe Co., supra; Stevens v. Crane*, 37 Mo. App. 487, 493; *Steinberg v. Gebhart*, 41 Mo. 519; *Nearns v. Harbert*, 25 Mo. 352; Thompson on Trials, sec. 2606, p. 1972.

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SMITH, P. J.— Plaintiff sued defendant for damages. He alleged that he entered into a written contract with defendant whereby the latter agreed to employ him as bar-tender for one year at $70 per month, and that at the end of the third month he discharged him without good cause; that he was unable to obtain regular employment for the remainder of the term of his employment under his contract. The answer admitted plaintiff's service, and then alleged that defendant discharged plaintiff on account of incompetency caused by frequent intoxication, and because he was quarrelsome, unaccommodating and negligent in his duties. There was a trial and a judgment for plaintiff. The defendant appealed.

I. The defendant's appeal rests upon several grounds; the first of these is, that the court over the objection of the defendant allowed the plaintiff in rebuttal to show by witnesses that the plaintiff was sober at such times as they saw him. It was perfectly competent for plaintiff in making out his case to show generally that he faithfully discharged the duties of his employment. It would, however, be improper under the ruling in *Suttie v. Aloe*, 39 Mo. App. 38, for him to show in rebuttal that he was sober on the occasions when the witnesses so testifying saw him, were it not that the testimony of some of the defendant's witnesses was to the effect that plaintiff was drunk every night and pretty nearly every day. The evidence objected to negatived this. It was competent for that purpose. If the defendant's evidence had been limited to showing the plaintiff was drunk at specified times, of course, evidence in rebuttal showing him sober generally or at other times would have been improper. The answer charged that on account of plaintiff's frequent intoxication he was rendered incompetent to discharge his duty. The tendency of some of the defendant's evidence was to establish this charge. The effect of the

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evidence complained of was to disprove this allegation, and to rebut the evidence by defendant in support of it.

II. No material variance is pointed out, nor is any perceived, between the contract stated in plaintiff's petition and that introduced in evidence. The rule invoked, that the plaintiff could not recover on a contract other than that declared on, can have no application here. The suit was to recover wages due under the contract.

III. The defendant complains of the action of the court in permitting the plaintiff during the progress of the trial to amend his petition. The amendment was immaterial and unnecessary. The allegations of the petition were quite sufficient without the amendment. Besides, the statutes in relation to amendment are liberal. The appellate courts are not disposed to interfere with the trial courts in the exercise of their statutory discretion except where there has been manifest abuse of that discretion. When before final judgment, an amendment of the petition is asked in order that plaintiff may have such redress as the proof may show him entitled, it is no abuse of the discretion given the court to permit it. *Carr v. Hoss*, 37 Mo. 447; *McMurry v. Martin*, 26 Mo. App. 457. Of course, the statute of amendments must not be construed so as to encourage negligence in pleading. In view of the fact that the amendment was unimportant and of the further fact that the court offered to continue the cause when it permitted the amendment and of the election of the defendant to proceed with the trial, we can discover no ground of complaint that can be based on the action of the court in that regard.

IV. There was no error in permitting the plaintiff to reply to the answer after the plaintiff had rested his case on the evidence. This was justified by the provisions of the statute authorizing amendment to be made in furtherance of justice. R. S., sec. 3567; *Trans. Co. v. Sims*, 36 Mo. App. 221. It was a matter

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in the discretion of the court with the exercise of which we will not interfere unless it appears there was some abuse of that discretion which we cannot see is the case.

V. The plaintiff alleged in his petition that he was upright, honest, and faithfully performed all his duties while in the active employment of defendant. To make out his *prima facie* case it was as unnecessary for him to plead and prove his sobriety as it would be in an action for personal injuries grounded on the negligence of the defendant for him to plead and prove that the injuries were done to him without any fault on his part. *Hudson v. Railroad*, 101 Mo. 13. The defense was that defendant was so frequently intoxicated as to render him incapable of performing the duties of his employment and the burden of establishing this defense was properly ruled on the defendant.

There is a class of cases of which *Bogie v. Nolan*, 96 Mo. 85 and *Feurt v. Ambrose*, 34 Mo. App. 361, are types, where, on account of the confidential relation of the parties to the contract, the burden is cast upon the party in whom the confidence is imposed to prove it was not procured by means of such confidence.

The cases just cited can, therefore, have no application to a case of this kind. Nor does the case of *Clifton v. Sparks*, 25 Mo. App. 383, lend any support to the defendant's contention.

VI. It is true the jury under the evidence might have found for the plaintiff a greater amount than they did, still we cannot say that the finding of the less amount was prejudicial to defendant or was such a flagrant disregard of the evidence and instructions as would warrant us in vacating it upon the complaint of the defendant. We are commanded by the statute not to reverse the judgment of any court, unless we believe error was committed against the appellant materially affecting the merits of the action.

It follows that the judgment of the circuit court must be affirmed. All concur.

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JOHN A. HICKS, Respondent, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, June 22, 1891.

1. **Negligence:** PROXIMATE CAUSE: PROBABLE RESULT: EVIDENCE. Liability does not follow every negligent act, though injury does ensue. The negligent act must be the proximate cause of the injury, which must also have been the natural and probable result of the act. The evidence examined and found not to sustain the claim that the plaintiff's injury was the natural or probable cause of defendant's negligence.

2. ——— : CONTRIBUTORY NEGLIGENCE. Where the plaintiff, standing on his wagon loading shingles from a car to which his team is tied, sees a car which has been switched on the same track coming faster than usual down the grade to the car where he is working with increasing speed, and does not sit down though he has left the lines tied to the car and the horses are hitched to the wagon, he does not exercise such common prudence as to entitle him to recover. [GILL, J., *dissenting.*]

3. ——— : ——— [SMITH, P. J., *concurring*]. In order to defeat the right of action it must appear, but for the plaintiff's negligence operating as an efficient cause of the injury in connection with the fault or neglect of the defendant, the injury would not have happened.

ON MOTION FOR REHEARING.

4. **Negligence:** DIFFERENCE OF FAIR-MINDED MEN. The rule that negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ, if allowed to prevail, would render the appellate court powerless to reverse any cause for contributory negligence.

Appeal from the Barton Circuit Court.—HON. D. P. STRATTON, Judge.

REVERSED.

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R. T. Railey, for appellant.

(1) The court committed error in overruling defendant's demurrer at the close of plaintiff's evidence, and in overruling a similar demurrer after all the evidence had been introduced. We submit that the undisputed facts herein make out one of the clearest cases of contributory negligence ever reported in the books. Unless the courts of this state propose to abolish the doctrine of contributory negligence, and refuse to longer recognize it as a defense, we submit that the demurrer to the evidence, after the close of the whole case, should have been sustained. *Smotherman v. Railroad*, 29 Mo. App. 266; *Tuley v. Railroad*, 41 Mo. App. 437, 438; *Moody v. Railroad*, 68 Mo. 471; *Henze v. Railroad*, 71 Mo. 636; *Purl v. Railroad*, 72 Mo. 171; *Turner v. Railroad*, 74 Mo. 605; *Powell v. Railroad*, 76 Mo. 80; *Lenix v. Railroad*, 76 Mo. 91; *Hixson v. Railroad*, 80 Mo. 337; *Kelly v. Railroad*, 88 Mo. 534; *Harris v. Railroad*, 89 Mo. 236; *Yancy v. Railroad*, 93 Mo. 433; *Butts v. Railroad*, 98 Mo. 278; *Hudson v. Railroad*, 14 S. W. Rep. (Mo.) 15; Bishop on Non-Contract Law, sec. 484; *Harris v. Railroad*, 40 Mo. App. 261; *Gray v. Railroad*, 65 N. Y. 561. (2) The overwhelming testimony, as will appear from the record and statement of case herein, conclusively shows that plaintiff was guilty of negligence which directly contributed to, and brought about, the injury complained of. The jury must have either entirely disregarded the instructions and the evidence, or their verdict was the result of passion or prejudice. The court below ought, therefore, to have set aside the verdict. Having failed to do so, we ask a reversal at the hands of this court. *Whitsett v. Ransom*, 79 Mo. 258; *Spohn v. Railroad*, 87 Mo. 84; *Garrett v. Greenwell*, 92 Mo. 125; *State v. Prim*, 98 Mo. 372, 373; *Smotherman v. Railroad*, 29 Mo. App. 267, 268; *Tuley v. Railroad*, 41 Mo. App. 437, 438.

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Buler & Timmonds, for respondent.

(1) Plaintiff was not only where he had a right to be, but where he was required by the regulations of the defendant to be; and he was where defendant's employes, in charge of the train, saw, or by the exercise of ordinary care would have seen, him and his team and wagon. And it was as much their duty to look out for him and his team as for him to look out for them. *Kellny v. Railroad*, 101 Mo. 78. Plaintiff was not bound to be prepared for an act of negligence on the part of defendant. 32 Mo. App. 413; *O'Connor v. Railroad*, 94 Mo. 150; *Clay v. Railroad*, 24 Mo. App. 39. The burden of showing contributory negligence is upon the defendant. *King v. Railroad*, 98 Mo. 235; *O'Connor v. Railroad*, *supra*. Contributory negligence is, ordinarily, a question for the jury. *Drain v. Railroad*, 86 Mo. 574; *Petty v. Railroad*, 88 Mo. 306; *Weber v. Cable Co.*, 100 Mo. 194; *Cook v. Railroad*, 19 Mo. App. 329. When the question of negligence is one of fact, the appellate court will only look to see if there is sufficient evidence to support the verdict, if the question is raised by demurrer to the evidence. *Winters v. Railroad*, 99 Mo. 509. (2) A "flying switch" involves an extraordinary risk, and the degree of caution in making it should be commensurate with the risk or danger attending it. *Reagan v. Railroad*, 93 Mo. 352; *O'Connor v. Railroad*, 94 Mo. 150. In many instances, the making of a "flying switch" is held to be negligence *per se*. Pierce on Railroads, p. 356; 94 Mo. 155, 156; 1 Thompson on Negligence, p. 452. Negligence is not imputable to a person for failing to look out for danger, when, under the surrounding circumstances, he had no reason to suspect any. *Langan v. Railroad*, 72 Mo. 392. The law presumes the plaintiff to have been in the exercise of ordinary care, until the contrary appears. *Parsons v. Railroad*, 94 Mo. 293; *Buesching v. Gaslight Co.*, 73 Mo. 219. (3) It is

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negligence to run a car with a broken, defective or insufficient brake. Pierce on Railroads, p. 355. When it has been shown that defendant was using a broken, defective or insufficient brake, a *prima facie* case of negligence has been made, and it then devolves upon defendant to account for the condition of the brake, which was not done in this case. *Huff v. Railroad*, 17 Mo. App. 361; *Norton v. Railroad*, 40 Mo. App. 642; *Hepsley v. Railroad*, 88 Mo. 348; *Lemon v. Chanslor*, 68 Mo. 340; *Miller v. Railroad*, 90 Mo. 393; *Parsons v. Railroad*, 94 Mo. 292; *Gutridge v. Railroad*, 95 Mo. 468. (4) The "flying switch" was the proximate cause of the injury. 1 Sutherland on Damages, pp. 20–73; *Metallic Co. v. Railroad*, 109 Mass. 277; Pierce on Railroads, p. 348; *Meyers v. Railroad*, 59 Mo. 223; *Brooks v. Railroad*, 35 Mo. App. 571; *Adams v. Railroad*, 100 Mo. 555; *Strauss v. Railroad*, 75 Mo. 186; *Waldhier v. Railroad*, 87 Mo. 37; 2 Thompson on Neg., pp. 1063, 1067, 1079, 1085, 1089, 1097. In this case there was a flying switch, a defective brake, a consequent collision of cars, an unusual concussion and jar, a startling of the team, a consequent jerk of the wagon, and plaintiff was thereby thrown to the ground—a continuous succession of events, so linked together as to make a natural whole. 1 Sutherland on Damages, p. 62. For numerous illustrations of proximate causes and consequential damages, see 1 Sutherland on Damages, p. 24, *et seq.*

Ellison, J.—Plaintiff sues for personal injury received by falling off his wagon. He recovered below, and defendant appeals. He was a witness in his own behalf, and from his testimony (affirmative in character) we gather the facts which are necessary to dispose of this case. He was a teamster who had been engaged for eight or nine years in unloading lumber from cars. His horses were "not afraid of the cars," one of them he had used in this business four years; the other "had

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been raised around the depot from a colt, he was seven years old; I had worked them about four years, each one of them, around the depot." He knew the time of the trains, and knew the train would be in at the time he was loading his wagon when this accident happened. He drove his wagon along by the side of the car and hitched his team by tying the lines to the car. He then proceeded, with the aid of his hired man, to load his wagon with shingles from the car. As he had nearly finished his load, the defendant's servants took a car out of the train and made with it what is called a flying switch, sending it down on the sidetrack upon which was the car plaintiff was unloading, "bunched" with three others. By reason of having no brake (or a defective one) the car, moving a little down grade, went faster than usual in making such switches, and struck the standing car with some more force than usual, and made a noise which caused the horses to startle or jump, plaintiff losing his balance and falling off his wagon, whereby he was hurt so as to disable him from work for a time. The horses made no attempt to get away or run. Plaintiff was not hurt by being knocked down in the car, or by falling from the car, or while in the act of getting out of the car. He was on his wagon and fell from his wagon. He states explicitly that he was on his wagon "standing up on top of the shingles." His assistant states that he was putting the shingles on the wagon as he, the assistant, handed them out of the car, and that plaintiff was on the wagon at the time of falling. Some other witness standing off from the scene did not place him so definitely, but I take it that plaintiff's statement should be accepted in this respect as the fact. However, there is no necessity in referring to the testimony as the petition declares him to have been upon the wagon, and alleged that he fell from the wagon, and so his instructions were framed. The witnesses described the manner of striking the standing cars by saying that they were struck with "pretty good force,"

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—with "considerable force,"—and that it made "considerable noise." One witness had "seen cars (on the main track) struck in switching about as hard as this was struck, although this struck harder than usual." Another witness said: "It seemed as if it (the car) was going with ordinary speed as they usually make flying switches." It may be conceded, however, that the car went down the sidetrack faster and struck the standing cars with more force than was usual; and that in coming together they made more than the usual noise. Indeed, it must be conceded that the defendant was guilty of negligence in switching the car with a defective break. But it need scarcely be suggested that liability does not follow every negligent act though an injury does ensue. The negligent act must be the proximate cause of the injury. The injury must also have been the natural and probable result of the act. *Snelling v. McDonald*, 14 Allen, 292; 1 Sutherland, Dam. 23.

Now was it the natural or probable result of the switch made as this one was, that the horses, which had worked amid such scenes and in such confusion all their lives, would be startled? And, if probable that the horses would be startled, was it further probable that plaintiff would lose his balance and fall off the wagon? Defendant's servants could well suppose that the plaintiff would not be engaged as he was, in the situation of his team at the time, unless they were thoroughly used to the confusion and noise of trains switching. The horses were not struck by the car, nor by anything from the car; they jumped merely because of the noise. Must defendant, in such a situation, be held to an established volume of noise in coupling or switching cars? Is it reasonable to suppose that anyone could assume that these horses would only stand a certain amount of racket or noise of the kind in question? Keeping in mind that these were horses that

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were, and had been for years, accustomed to the railroad yards and to the noise and confusion of such places, how can it be said that defendant should be confined to a limited amount of noise in coupling or switching cars at the yards, or that defendant should know the limit beyond which they would be startled?

II. Another view of the case is equally fatal to the plaintiff's claim. He was guilty of contributory negligence. He stated that he saw the car coming, and that it was coming at faster speed than usual in such cases. His words are: "I saw it coming tolerably 'pert,' but I have seen them go that fast at the start, but the further that come the faster it come; it was down grade a little and they didn't check it up any." He further testified that the switches had been frequently made to the cars he was, at the time, unloading. He must certainly be held to as much knowledge as to the probable effect on his team as defendant's servants had, yet he remained standing, when by simply sitting down he would have been safe. He fell by losing his balance, and, while the bunch of shingles he had in his hands fell to the ground, none of the load was jerked off. There is no question whatever that he could have sat down and avoided falling. But it is urged that he did not have time after he saw the danger, and so he states. This will not do, for he saw the car coming and noted its increasing speed. It will not do to say that he did not know the noise would be so loud, for he was familiar with these things and knew all about them. Nor will it do to say that he did not think his horses would be startled, for that would destroy his case. This is not all. He hitched the horses by tying the lines to the car. It is true that this did not cause the move by the horses which threw him off his wagon, but it shows he thought it necessary to hitch them somewhere. By hitching them it perhaps provided against their getting away, but it did not provide against a sudden jerk on the tugs. Now it seems to me that in

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the situation he places himself, the business he was engaged in, at the place he was, common prudence would have suggested that he detach the tugs from the swingle trees. If this simple, ordinary precaution had been taken this accident would not, of course, have happened. In view of the situation he was in, anyone would suppose that plaintiff would have protected himself from any danger likely to arise under such circumstances. But, instead of such protection, he hitched the horses by the lines, to the car, and, by the tugs, to the wagon.

The operation of a railway is a dangerous business, and such companies should be rigidly held to every legal responsibility, that they may be made watchful for the personal safety of those with whom they may come in contact; but in my view this cause cannot be sustained without doing violence to the right of the matter as well as the law of the case. At the same time, I have to confess that I feel some hesitation in my conclusion resulting from the fact that GILL, J., whose well-known sense of justice and practical application of legal principles has come to a different conclusion.

The judgment will be reversed. SMITH, P. J., concurs in a separate opinion.

SMITH, P. J.—Undeniably, it appears from the evidence that the defendant was guilty of negligence in the manner of "shunting" its cars, at the time and place of the injury. And it is equally plain that the plaintiff, at the time of the happening of the injury, was not exercising the due care enjoined by law. The true rule is, that if the negligence of the plaintiff contributed *in any degree* to cause or occasion the injury there can be no recovery, or, as it is sometimes said, that it must appear, in order to defeat the right of action, that, but for the plaintiff's negligence operating as an efficient cause of the injury in connection with the fault or neglect of the defendant, the injury would

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not have happened. It is quite obvious, to my mind, that an application of the above-quoted rule to the essential facts, which the undisputed evidence establishes in this case, must necessarily preclude a recovery by plaintiff. In my opinion it constitutes an insurmountable barrier to the plaintiff's right of recovery, and so I must join in the conclusion reached by Judge ELLISON.

ON MOTION FOR REHEARING.

ELLISON, J.—We are asked to grant a rehearing in this case, which we feel constrained to refuse. We have no controversy with the counsel on the proposition of law he advances. Our conclusion was, and is, that the plaintiff has not made out a case which can be sustained under the law. We have kept steadily in view the legal principles which counsel point out, but find ourselves unable to draw from them conclusions favorable to the case made. The proposition is advanced that "negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ," and it is then contended that, since the trial judge, the jury and one of the members of this court differ from the majority of the court, the legal proposition applies, and we are concluded from declaring plaintiff's conduct to have been negligence. We assume that when a question of negligence is at issue in a trial court, and is passed on by the judge and jury, that the result is the honest conclusion of fair-minded men. If, therefore, we allow plaintiff's contention to prevail, we find ourselves powerless to reverse *any* cause for contributory negligence. It can always be said to an appellate court that, notwithstanding its opinion, the jury differed, and, it being a difference between honest and fair-minded men, the verdict must stand. In other words the verdict is absolute, and must stand in all cases whatever may be the opinion of the reviewing tribunal.

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Referring to what defendant might reasonably have expected to result from switching a car with defective brake. It is quite truly said (and authority is cited to sustain it) that horses will become frightened by extraordinary sights and sounds, and that liability attaches for frightening horses by the negligent discharge of a gun. But suppose the injured party drives up to where he knows guns are to be fired, puts the reins out of his reach and stands upright on his loaded wagon; what then?

A case is reported from Tennessee (Meigs, 561), where a militia captain drilling his company on the public streets, and ordering a discharge of firearms, was held liable for the value of a horse killed by running away. But it is easy to see what the decision would have been in that case had the militia been upon their own parade grounds, and the owner of the horse had driven there knowing the drill was to take place. So, if the horse had belonged to some one who handled baggage or equipage for the company, and for this purpose always attended the drill, it would be equally clear that no liability would have attached, and in such case the plea that the muskets were somewhat heavier loaded than usual would probably not have been seriously received. The motion is overruled.

A. J. HENDRICKS, Respondent, v. THOMAS D. EVANS, Appellant. 46 313 / 90 259

Kansas City Court of Appeals, June 22, 1891.

1. **Bailment:** BAILEE: SELLING: TITLE. A mere bailee is not authorized or empowered by the relation of bailment to convey title against the owner, even though the purchaser honestly believed him to be the true owner.

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2. **Conversion**: MEASURE OF DAMAGES: IMPROVED CONDITION. Where the defendant purchased a team of horses from plaintiff's bailee, and, when plaintiff demanded the same, put the horses out of his possession, the measure of damages is the value at the time of the demand, though the condition of the horses had improved since the purchase.

Appeal from the Cass Circuit Court.—HON. CHAS. W. SLOAN, Judge.

AFFIRMED.

H. Clay Daniel and *J. S. Wooldridge*, for appellant.

(1) Plaintiff delivered the horses and harness into the possession of Abbott, who was, therefore, rightfully in possession of them by plaintiff's own act. Possession is presumptive proof of ownership. 1 Greenl. Ev., sec. 34; *Jackson v. Love*, 33 Am. Rep. 687; 1 Thompson on Trials, sec. 1407; *Stephens v. Board of Education*, 32 Am. Rep. 510. (2) Where one of two innocent parties must suffer for the wrongful act of another, he must suffer who placed the party doing the wrong in a position to do it. *Neuhoff v. O'Reily*, 93 Mo. 164; *Bank v. Bank*, 71 Mo. 197; *Richardson v. Palmer*, 36 Mo. App. 95-6; Story on Agency [9 Ed.] sec. 127; *Preston v. Witherspoon*, 7 W. Rep. 71-75; *McNeil v. Bank*, 7 Am. Rep. 343, and cases cited; *Bank v. Railroad*, 7 Cent. Rep. 822. (3) Defendant was a *bona fide* purchaser for full value without notice, and is entitled to protection. "Where the owner holds out another or allows him to appear as the owner of, or as having full power of disposition over, the property, and innocent third parties are led into dealing with such apparent owner, they will be protected." 2 Rapalje on Estoppel, sec. 978; *Depew v. Robards*, 17 Mo. 580. (4) The court erred in giving instruction, numbered 2, asked by plaintiff. The conversion of the property took place

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when the defendant purchased the property, took possession of it and controlled it as his own, and in a manner inconsistent with the alleged rights of the plaintiff. "The exercise of such a claim of right or dominion over the property as assumes that he is entitled to the possession, or to deprive the party of it, is a conversion." *Farnald v. Chase*, 37 Me. 290. (5) The refusal to deliver the property when demanded by the plaintiff was not a conversion. (6) In actions of trover and conversion the measure of damages is the value of the goods at the time of their conversion and interest. *Spencer v. Vance*, 57 Mo. 427, 430; *Carter v. Feeland*, 17 Mo. 383; *Polk v. Allen*, 19 Mo. 467; *Seibel v. Slemon*, 72 Mo. 531; *Nance v. Metcalf*, 19 Mo. App. 182; *Loeffler v. Packet Co.*, 7 Mo. App. 185; *Wahl v. Machine Co.*, 5 Mo. App. 597; 3 Pars. Con. [5 Ed.] p. 197.

W. G. Cochran and *Whitsitt & Jarrott*, for respondent.

(1) Appellant claims that possession is presumptive or *prima facie* evidence of ownership. This may be true as an abstract proposition of law, but it cannot apply to the case at bar. If appellant's theory is correct, any bailee or common carrier could sell property to any person who would "buy it in good faith," and the owner would have no remedy against the purchaser. (2) The authorities cited by appellant under his second and third propositions have no application to the case at bar. (3) The instruction, numbered 2, given by the court properly declared the law. The evidence was uncontradicted that on February 14, A. D. 1888, plaintiff was the owner of the property; that he was entitled to the possession of the same; that when demand was made defendant gave no excuse or explanation for keeping it. The conversion was then complete. Defendant claimed that he came into possession lawfully. If that was true he could not convert the same until after

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he refused to deliver the same to the true owner. *Carter v. Feeland*, 17 Mo. 383.

Ellison, J.—In December, 1887, plaintiff was in Kansas. He employed one Abbott to take a team of horses with harness to the state of Illinois. When Abbott reached Harrisonville, Missouri, he sold the property to defendant, the latter believing Abbott to be the owner. When plaintiff learned several weeks afterward that Abbott had sold the property he went to Harrisonville, and demanded his property. Defendant refused to deliver, whereupon plaintiff began a suit in replevin, but it seems that defendant put the property out of his possession so that it was not found by the officer; thereupon plaintiff dismissed the replevin, and began the present action for conversion.

Defendant contends here that since plaintiff placed the property in the possession of his hired man, Abbott, and that he bought of Abbott, honestly believing him to be the true owner, he should now be protected. This will not do. Abbott was a mere bailee, and that the relation does not authorize or empower him to convey a good title against the true owner is too plain to require discussion.

II. When the horses were purchased by defendant they were lean, and in poor condition. At the time they were demanded by plaintiff they were much improved in flesh and strength. This has brought about a contention between the parties as to the measure of damages. The trial court instructed the jury to fix the value at the time of demand. Defendant says the conversion took place when he purchased, and that the value at that time with six-per-cent. interest is the true measure of damages. Our opinion is with the trial court. Much discussion is found in the books as to the measure of damages for the conversion of chattels where addition has been made to the value since the original conversion. The case of *Wetherbee v. Green*, 22 Mich. 311,

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is an interesting one on this subject. There certainly can be no question that, where property has been wrongfully (though innocently) appropriated, the owner has a right to follow it into the hands of whosoever may have it, even though in the meantime it has increased in value by the addition of labor or money, provided there has been no substantial destruction of identity. As to what change of identity it should undergo in order to prevent a recovery in specie, and the owner be remitted to his action for damages, there is contrariety of opinion. But in the case at bar, the property being live animals, there is no question of identity, the only change being that made by an increase of flesh. It is preposterous to suppose that by fattening the horses defendant fed plaintiff out of his title. Therefore, plaintiff at the time of the demand was the owner of the horses, and was entitled to them *as they then stood*, and he could elect to treat the conversion as being made at that time. *Ellis v. Wire*, 33 Ind. 127; *Moody v. Whitney*, 38 Maine, 174, 177, 178; Cooley on Torts, 458, side p. Defendant by refusing to deliver the property to plaintiff, and by thwarting him in his effort to get it, converted it in its then present condition, and he should pay its value at that time. "The right to the improved value in damages is a consequence of the continued ownership. It would be absurd to say that the original owner may retake the thing by an action of replevin, in its improved state, and yet that he may not, if put to his action of trespass or trover, recover its improved value in damages." *Selsbury v. McCoon*, 3 N. Y. 379.

If the plaintiff had not chosen to assert his ownership to the specific property as improved, or in its improved state, a different question would have arisen, and much of the authority relied upon by defendant would be applicable to that state of case; for it will be noticed that we have not said anything to militate against the rule that the measure of damages in trover

is the value of the property at the time of the conversion with interest. In *Walker v. Borland*, 21 Mo. 293, cited by defendant, the rule is stated to be "to estimate the value at the time the injury was committed, and to allow interest to the time of the trial;" and we have done no more than this in this case. The injury was committed by the defendant when he refused to permit plaintiff to take his own.

The judgment is affirmed. All concur.

CHARLES E. BARNHART, Appellant, v. JULIUS C. HUGHES *et al.*, Respondents.

Kansas City Court of Appeals, June 25, 1891.

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Covenant for Title: INCUMBRANCES: BENEFIT ASSESSMENT FOR STREET IMPROVEMENT: ATTACHMENT OF LIEN: SUBSTANTIAL DAMAGES. The lien of the assessment of benefits for street improvement, and of the judgment thereunder, attaches as of the date of the approval of the ordinance, and constitutes an incumbrance for which the covenantor must answer to the covenantee who discharges such lien, although the amount of such lien was not ascertained until after the making of the covenant, the covenantee in the meantime having had and enjoyed the property. And he is entitled to recover the actual damages sustained, as the covenant will run with the land and remain alive in the hands of a subsequent grantee who may be compelled to remove the incumbrance; for, then, the substantial breach occurs, and a substantial recovery may be had.

Appeal from the Jackson Circuit Court.—HON. JOHN W. HENRY, Judge.

REVERSED AND REMANDED (*with directions*).

Lathrop, Morrow & Fox, for appellant.

(1) The lien of the assessment of benefits, and of the judgment rendered thereunder, attached as of the

date of the approval of the ordinance for the opening of the street. Charter, City of Kansas, art. 7, sec. 5; Revised Ordinances, 1888, p. 64; *Blossom v. Van Court*, 34 Mo. 390; *McLaren v. Sheble*, 45 Mo. 130. (2) A covenant against incumbrances runs with the land to the extent, at least, that, while it is technically broken at the time the deed is made, the substantial right of action arises when the covenantee is compelled to pay money in order to discharge an incumbrance. *Winningham v. Pennock*, 36 Mo. App. 688; *Taylor v. Priest*, 21 Mo. App. 685; *Priest v. Deaver*, 22 Mo. App. 276; *White v. Stevens*, 13 Mo. App. 240; *Walker v. Deaver*, 79 Mo. 664; *Wyatt v. Dunn*, 93 Mo. 463; *Blaikie v. Hudson*, 117 Mass. 181; Elliot on Roads & Streets, p. 555; *Cadmus v. Fagan*, 47 N. J. L. 547; *Commissioner v. Linden*, 40 N. J. Eq. 27; *White v. Strecht*, 22 N. J. Eq. 76. (3) The only question being as to the *quantum* of damages the appellate court should render judgment for the full amount, without remanding the case. *Blossom v. Van Court*, 34 Mo. 390.

Lyon & Ryland and *C. O. Tichenor*, for respondents.

(1) Yet the covenant against incumbrances refers to those existing at the date of the deed; if there is one it is broken so soon as the deed is executed. How can a matter hanging upon so many doubts be considered as existing? In the language of the New York decisions it was not an incumbrance, "within the meaning of the covenant against * * * incumbrances in the deed." *Dowdney v. Mayor, etc.*, 54 N. Y. 188; *Patterson v. Arthurs*, 9 Watts, 154; Cooley on Taxation [2 Ed.] 606; *Patterson v. Society*, 24 N. J. 400. (2) The language of the charter is peculiar, "shall be a lien * * * charged from the day the ordinance providing for the improvement takes effect until paid."

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"It shall be sufficient to bring in the owners of property who may be such at the date of the passage of the ordinance." It was held in *Stewart v. White*, 98 Mo. 226, that judgment was good, though the owner at the date of the ordinance was not a party. (3) Covenants are to prevent loss, not for the purpose of speculation. The vendor gets no benefit from the prospective improvement which may never come to pass. It does not increase the purchase price. When a final judgment is reached, the improvement is a fact; not until then. The one who then owns the ground eats the fruit, not the one who sold it years before. True, the owner pays for the improvement; but he gets that for which he pays, exactly the same as if he had built a house on the lot. How can he say he is damaged $1,000, when he actually gets an improvement by that assessment worth $1,000? *Bank v. Glen*, 68 N. C. 38; *King v. Gilson*, 32 Ill. 355; *Chin v. Wagner*, 26 Mo. App. 679; *Stebbins v. Wolf*, 33 Kan. 765; *Ogen v. Ball*, 36 N. W. Rep. 344; *Walker v. Deaver*, 79 Mo. 664; *Williamson v. Hall*, 62 Mo. 405; *Kellog v. Malin*, 62 Mo. 429. (4) We also refer to the following cases, illustrating the points we make: *Newcomb v. Fiedler*, 24 Ohio St. 463; *Mackey v. Harmon*, 34 Minn. 168; *Wadhams v. Swan*, 109 Ill. 60; *Wetherbee v. Bennett*, 2 Allen, 428; *Greene v. Creighton*, 7 R. I. 10; *Knowles v. Kennedy*, 82 Pa. 451; *McLaughlin v. Miller*, 57 Hun, 430; *Prescott v. Truman*, 4 Mass. 627.

ELLISON, J.—This is an action to recover upon a breach of covenants against incumbrances. On January 6, 1887, defendant Hughes conveyed the property in controversy, by warranty deed, to defendant Singleton, with the covenant that "he is lawfully seized of an indefeasible estate in fee, in the premises herein conveyed; that he has good right to convey the same; that the said premises are free and clear of any incumbrance done or suffered by him or those under whom he claims;

and that the said Julius C. Hughes will warrant and defend the title to the said premises unto the said parties of the second part and unto their heirs and assigns against the lawful claims and demands of all persons whomsoever,'' except as to certain specified matters not in controversy here. On May 23, 1887, defendant Singleton conveyed the said property to William R. Barnhart by warranty deed, with the same covenants above set out. On May 16, 1888, said William R. Barnhart conveyed the same property to this plaintiff, with the same covenants. On April 13, 1886, ordinance 33000, to open, widen and establish Woodland avenue, in Kansas City, was duly passed and approved. The lots in controversy were within the benefit district, prescribed by said ordinance. On January 4, 1890, the plaintiff was compelled to pay off this judgment in order to prevent an execution sale of the property in controversy. The lien of the assessment of benefits, and of the judgment rendered thereunder, attached as of the date of approval of the ordinance for the opening of the street. Charter, City of Kansas, art. 7, sec. 5. The actual work of opening and widening the street was done while the lot was owned by the plaintiff. The case was tried by the court sitting as a jury. Judgment was rendered for plaintiff for nominal damages, from which plaintiff appeals, contending that he is entitled to recover the full amount of judgment and interest paid by him to extinguish the judgment lien.

There is no dispute as to the foregoing facts, and from them we have no doubt of plaintiff's right to recover, not merely nominal, but substantial, damages for a breach of the covenant. It appears conceded, and so the trial judge must have decided, by allowing nominal damages, that the passage of the ordinance created an incumbrance on the property. That the covenant against incumbrances, though technically broken when made, will, nevertheless, run with the land till a substantial breach occurs, was decided, upon full consideration, in

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Winningham v. Pennock, 36 Mo. App. 688. We there said that a covenant against an incumbrance of like character to the one now in question "will run with the land and remain alive in the hands of a subsequent grantee who may be compelled to remove the incumbrance; for, then, the substantial breach occurs, and a substantial recovery may be had." That case ought to really control this; but it is urged in this case that the improvement out of which the assessment on this property grew was made after the plaintiff became the owner, and that the "benefits" (which are the foundation of the assessment) accrued to this plaintiff, and, therefore, he ought not to recover. We cannot accede to this. The liability for which the lien is given by the charter of Kansas City is the incumbrance, and this dates from the passage of the ordinance. *Blackie v. Hudson*, 117 Mass. 181; *Cadmus v. Fagan*, 47 N. J. L. 549; Elliott on Roads & Streets, 555.

The amount of this liability is ascertained afterwards, but it is covered by the covenant, whatever it may be. It relates back as of the date of the ordinance. It is a settled question in this state that the mere assessment for taxes constitutes an incumbrance for which the covenantor must answer to the covenantee, who pays them, although the amount of the tax was not ascertained until, perhaps, a year afterwards; the covenantee in the meantime having had and enjoyed the property. So the argument advanced by plaintiff would apply equally as well if this was a sewer tax, levied upon a sewer district, instead of a benefit assessment. In such case the incumbrance would exist, and liability would attach to the covenantor, notwithstanding the sewer improvement was put in after the covenantee became the owner.

It was said at the argument that the passage of the ordinance was not the consummation of the tax, and that in a variety of ways it might never be consummated. This, we can readily grant for present purposes;

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but, at the same time, it will be admitted that, at least, it probably will be carried out, and, for this very reason, the covenantee takes the covenant against it. These matters, we may well assume, are in the minds of the parties when they agree upon a price and determine upon the kind of conveyance.

As the plaintiff paid $293.90 in discharge of the incumbrance, we will reverse the judgment, and remand the cause, that he may have judgment entered for that sum and interest. All concur.

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F. B. HATCH, Respondent, v. ANNA HANSON, Appellant.

Kansas City Court of Appeals, June 25, 1891.

1. **Appellate Practice:** BRIEF: POINTS AND AUTHORITIES. Rule 15, which is founded on the statutes, requires appellant to file a brief containing in numerical order the points or legal propositions relied on, with citations of such authorities as counsel desire to present in support thereof; and when authorities are cited without any designation of the point or legal proposition that they are intended to support, the brief is subject to objection.

2. **Action:** MONEY HAD AND RECEIVED: INTEREST IN LOTTERY TICKET: CONTRACT: LEGAL, WHERE MADE: EXECUTORY CONTRACT. K., with his own and the money of plaintiff and another, sent to New Orleans and bought tickets in the Louisiana Lottery Company. On the receipt of the tickets at the post office, he, without the knowledge of the other two, turned over four of the tickets to defendant. At the drawing one of the tickets so turned over drew a prize, which defendant collected, and refused to pay plaintiff his share. *Held,*—

   (1) Plaintiff can maintain his action to recover his share.

   (2) The purchase of the tickets was a Louisiana contract and valid, and was not affected by the anti-lottery laws of this state.

   (3) When the money came to defendant's hands the contract was executed, and she cannot use the taint of illegality as a shield to protect herself against the claim of plaintiff.

   (4) The preceding points are reaffirmed on motion for rehearing.

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3. **Evidence: FOREIGN STATUTE: PLEADING.** When the action is not based on a foreign statute, it is unnecessary to plead it in order to introduce it in evidence.

Appeal from the Jasper Circuit Court.—HON. M. G. McGREGOR, Judge.

AFFIRMED.

C. B. McAfee, for appellant.

Cited: *Funk v. Galliger*, 49 Conn. 124; 44 Am. Rep. 210; *Kitchen v. Greenbaum*, 61 Mo. 110; Const. Mo., sec. 10, art. 14; R. S. 1889, sec. 3833, art. 8; sec. 3936, art. 8; *Shaffner v. Pinchbeck*, 24 N. W. Rep. 867; *Boyd v. Mill Creek*, 24 N. E. Rep. (Ind.) 661; *Jackson v. McLain*, 13 S. W. Rep. (Mo.) 393; *Nichols v. Trible*, 13 S. W. Rep. (Ark.) 796; *Sullivan v. Hergan*, 20 Atl. Rep. (R. I.) 232; *Goodrich v. Houghton*, 9 N. Y. Sup. 214.

Harding & Buller, for respondent.

(1) Our statutes, sections 3832 and 3833, page 915, simply prohibit, *first*, the establishing of any lottery, and, *second*, the advertising and sale of lottery tickets in this state. (2) In this case there was no sale or purchase in this state. *State v. Shaffer*, 89 Mo. 280; *Kling v. Fries*, 33 Mich. 275; *Case v. Riker*, 10 Vt. 482; 33 Am. Dec. 211; *Washburn v. Fletcher*, 42 Wis. 152. (3) The purchase was made in Louisiana, where it was lawful. Sess. Acts, La. 1868, 24, 25, 26. And courts will recognize the validity of contracts made, and to be performed in another state, precisely as they would be recognized in that state, and, especially, when executed, will protect the results. *Cohn v. Rinker*, 34 Fed. Rep. 472; *Kentucky v. Bassford*, 6 Hill (N. Y.) 526; *Stix v. Matthews*, 63 Mo. 37; *Roach v. Type Foundry*, 21 Mo. App. 118; *Mathews v.*

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Paine, 77 Ark. 55; *McGrow v. Hamlin*, 29 Mich. 476; *Antoine v. Smith*, 40 La. Ann. 560; *McIntyre v. Parks*, 3 Met. (Mass.) 207; *Jameson v. Gregory*, 4 Met. (Ky.) 370. (4) But, even if the original transaction was tinctured with illegality, so that it would not have been directly enforced by courts of this state, still, it having been executed, and the money paid, the respondent, into whose hands it happened to come, cannot avail herself of the illegality of the original transaction so as to shield herself from paying it over to the party for whose use she collected it. *McBlair v. Gibbs*, 17 How. (U. S.) 232; *Armstrong v. Toler*, 11 Wheaton, 258; *Brooks v. Martin*, 2 Wall. 70; *Warren v. Hewitt*, 45 Ga. 501; *Kitchen v. Greenbaum*, 61 Mo. 115; *DeLeon v. Trevine*, 49 Tex. 88; *Bank v. Bank*, 16 Wall. 483; *State v. Shadd*, 80 Mo. 358; *Land v. Coffman*, 50 Mo. 243.

C. B. McAfee, for rehearing.

The contract entered into between plaintiff, Bathurst and Kuhn, in Carthage, Missouri, upon which this suit is based, whereby they entered into an agreement to deal in lottery tickets in the state of Louisiana, in partnership or jointly, cannot be enforced, or a suit based thereon, in a state where lotteries and dealing in lottery tickets are prohibited, and ought not to be enforced here, even if the contract of partnership had been made in Louisiana, where it may be valid and enforceable. *Watson v. Murry*, 23 N. J. Eq. R. 257 (a case on all fours with this); *Watson v. Fletcher*, 7 Grattan, 1; *Abbe v. Marr*, 14 Cal. 210; *Hayden v. Little*, 35 Mo. 418, *supra; Buckingham v. Fitch*, 18 Mo. App. 91, *supra; Bank v. Bank*, 38 Fed. Rep. 804; *Kent v. Meltenberger*, 13 Mo. App. 503; *Parsons v. Randolph*, 21 Mo. App. 353; *Hamilton v. Scrulls, Adm'r*, 25 Mo. 165; *McCoy v. Greene*, 83 Mo. 626; *Waterman*

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v. Buckland, 1 Mo. App. 45; *Duncan v. Scott*, 11 Serg. & R. 164; *Thomas v. Brady*, 10 Burr. 170; *Scott v. Duffy*, 2 Hains, 20; *Hott v. Gun*, 73 Pa. 198; *Holman v. Johnson*, Cowp. 343. And see Bishop on Contracts, sec. 505, *et seq.*, and sec. 549; 1 Bishop Criminal Law [6 Ed.] sec. 500.

Smith, P. J.—Plaintiff's petition states that on the thirtieth day of January, A. D. 1889, plaintiff and one Kuhn and one T. H. Bathurst entered into an agreement to buy five one-twentieth tickets in the Louisiana lottery for the February drawing thereof, jointly and in partnership; that the plaintiff furnished to said Kuhn plaintiff's proportion of money as agreed upon to pay for his third interest in said five tickets; that said Kuhn thereupon sent an order for said five one-twentieth tickets to said lottery company, and received said tickets from said company by the course of mail; that plaintiff owned and was entitled to one-third interest in said five tickets, which tickets were numbered 64109, 611116, 54137, 59123 and 56630, and the said Kuhn held the said tickets for the joint use and benefit of plaintiffs, said Bathurst and Kuhn, each being interested one-third in same; that said February drawing of said lottery was duly held on the ——— day of February, 1889, and one of said tickets, to-wit, number 64109, drew a prize of $5,000, which was duly collected, or caused to be collected, from said lottery company by said Kuhn, whereby plaintiff was entitled to receive from Kuhn one-third of said amount of $5,000, to-wit, $1,633.33; but plaintiff alleges that said Kuhn, instead of paying over said sum to plaintiff as he was in duty bound to do, pretended that the defendant, Anna Hanson, had some interest in said ticket, and caused the money to be paid over to her, instead of to the plaintiff; that said Anna Hanson, combining and confederating with said Kuhn to defraud plaintiff of his money so collected and held by said Kuhn, who refuses to pay over or account to plaintiff for his money so had and

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received by said Kuhn and said Anna Hanson, wherefore plaintiff prays that defendants may be required to account to plaintiff, and to pay over said money so had and received belonging to plaintiff, and that judgment be rendered against defendants for said amount. Defendant's answer, in effect, alleged, *first*, that the said lottery ticket, number 64109, which drew the prize was jointly purchased and owned by defendant and Kuhn, and, *second*, that said Louisiana lottery, described in plaintiff's petition, was at the date alleged by plaintiff, and for a long time before, and still is, a gambling and gaming scheme prohibited by law, and that any and all dealings, buying, selling or contracting, concerning the same, are prohibited by law, and are null and void, and that said alleged agreement and contract set out by plaintiff in his petition is void, is a gaming contract, is against public policy, and plaintiff ought not, therefore, to recover.

The evidence tended to show that in January, 1889, three young men, Burt Kuhn, Frank Hatch (plaintiff), and Tom Bathurst, being co-clerks in a store at Carthage, Missouri, agreed "to chip in" together and send $5 to the Louisiana state lottery at New Orleans, for five one-twentieth tickets in the February drawing of that lottery, which was accordingly done, and one of them, Burt Kuhn, wrote the letter ordering the tickets and inclosing the $5 contributed by the three, the tickets being $1 each, which order and money was received by the lottery company in New Orleans, the order accepted, and the tickets mailed by the lottery company to Kuhn at Carthage, Missouri. In the meantime, some days after this order was sent for these five tickets for Kuhn, Hatch and Bathurst, Kuhn and Anna Hanson agreed to jointly order four tickets, also for the February drawing of said lottery, for themselves, which they accordingly did; but it seems this last order was sent too late for the February drawing, and hence the four tickets were sent for the March

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drawing ; but it so happened that when the five tickets, ordered by the three young men, came directed to Kuhn, he met Miss Hanson at the postoffice just as he opened the envelope inclosing the five tickets, and there gave her four of the tickets, thinking he would replace them with those intended by him for her and himself, when they arrived. The order sent by Kuhn for Miss Hanson and himself was not received in New Orleans in time for the February drawing of the lottery company, so their tickets were not received until the next month. Hatch and Bathurst were not aware that Kuhn had given the four tickets, in which they were jointly interested with him, into the possession of Miss Hanson until after the drawing. When the March drawing took place in New Orleans one of the tickets, purchased for the three young men, drew a prize of $5,000 which Miss Hanson proceeded to collect through a bank at Springfield, Missouri, and to divide with Kuhn. Kuhn, after this suit was begun, paid Bathurst one-third of the prize money, but Miss Hanson would not pay Hatch any part of the money she had received. The case was tried before the court, without a jury. No instructions were asked or given.

The court found for plaintiff and rendered judgment against Miss Hanson for one-third of the prize money received by her, and from which judgment she has appealed.

I. Rule 15, governing practice in this court, requires the appellant or plaintiff in error to file with the clerk an abstract or abridgment of the record in the cause, a brief containing in numerical order the *points or legal propositions relied* on, with citations of such authorities as counsel desire to present in support thereof. This rule is founded upon the statute. R. S., sec. 2301. It has not been observed by the defendant, who is appellant in this case. There are a number of authorities cited, but what point or legal proposition they are intended specially to support we are left to

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ascertain as best we may. Nor does the printed argument in any way supply the omission. But, as the case has been submitted without any objection on that account having been interposed by the plaintiff, we shall proceed to review what we are led to suppose are the grounds for the defendant's appeal.

The defendant, as we understand it, assails the plaintiff's petition on the ground that it does not state facts sufficient to constitute a cause of action, in that the contract made is void and against public policy; that it was a gambling contract or scheme that the courts will not aid in enforcing. This is the underlying and decisive question presented for our determination. The constitution of this state prohibits the legislature from authorizing any lottery, and forbids the allowance of the sale of lottery tickets. Const. Mo., sec. 28, art. 14. Section 3833, Revised Statutes, 1889, demands a penalty against, not only those who shall sell lottery tickets, but against any person who shall "be in anywise concerned in the sale or exposure to sale of any lottery ticket or tickets, or any share or part of any lottery ticket in any lottery or device in the nature of a lottery within this state or elsewhere." Neither the plaintiff nor defendant is alleged in the petition to have been in anywise concerned in the sale in this state of any lottery ticket or tickets in any lottery located within or without this state as was the case in *Kitchen v. Greenbaum*, 61 Mo. 110. There a sale of a ticket in a lottery situate in another state was made in this state. The parties were held to be guilty of violating the law. The rule has been declared to be that, when either party to the illegal contract or transaction applies to a court for aid, if the plaintiff cannot open his case without showing he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant. *Duncan v. Scott*, 11 Serg. & R. 164; *Thomas v. Brady*, 10 Burr, 170; *Scott v. Duffy*, 2 Harris, 20; *Allgear v. Walsh*, 24 Mo. App. 130; *Holt v. Green*, 73 Pa. St. 198. In

Holman v. Johnson, Cowp. 341–343, Lord MANSFIELD remarked: "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy which the defendant has had the advantage of, contrary to the real justice as between him and the plaintiff by accident, if I may say so. The principle of public policy is this, *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own statement, or otherwise, the cause of action appears to arise *ex turpi causa*, or from the transgression of a positive law of his country, then the court says he has no right to be arrested. It is upon that ground the court goes, not for the sake of the defendant, but because it will not lend its aid to such plaintiff. So if plaintiff and defendant were to change sides, and the defendant was to bring his action against plaintiff, the latter would have the advantage of it; for when both are equally in fault, *potior est conditio defendentis*." *Holman v. Johnson*, Cowper, 341; *Sullivan v. Hugar*, 20 Atl. Rep. 232. If the transactions, stated in the plaintiff's petition, do not show that he has broken the law, then his recovery in this case is not within its inflexible interdict.

By an act of the legislature of the state of Louisiana the "Louisiana State Lottery Company" was duly incorporated, with its domicile fixed at the city of New Orleans in that state. It was provided in that act that one of its objects was to establish a solvent and reliable home institution for the sale of lottery and combination tickets, devices and certificates, fractional parts thereof, at terms and prices in just proportion to the prizes to be drawn, and to insure perfect fairness and justice in the distribution of such prizes, etc. Acts of Louisiana, 1868, 24. The sale of tickets in this lottery within the state of Louisiana was made lawful there by express

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statutory provisions. If the plaintiff was concerned in the purchase and sale of one or more lottery tickets in said lottery at New Orleans, in the state of Louisiana, his act in that respect was not only lawful there, but could be no violation of the laws of this state, prohibiting the sale of lottery tickets within its jurisdiction. But was the transaction of the purchase and sale of the lottery tickets so made in the state of Louisiana, or in this state?

Mr. Story in his work on conflict of laws, eighth edition, section 258, states that all contracts made in a foreign country against good morals or religion or public rights, even though they be held valid in the country where they are made, would be held void elsewhere, or at least ought to be, if the dictates of christian morality, or even of natural justice, are allowed to have their due force and influence in the administration of international jurisprudence. Mr. Bigelow in *note b*, to the section just cited, remarks: "But, to come within this exception, a contract must be clearly founded in moral turpitude, and not *simply* contrary *to the statutes* of the country where it is sought to be enforced." Thus, in a case in New York where the sale of lottery tickets is prohibited by law, an action was brought on a bond conditioned for faithful performance of certain duties enjoined by a law of Kentucky, which authorized the obligees to sell lottery tickets for the benefit of a college in that state, and the bond was held valid, it being so at the place where the condition was to be performed, and it was immaterial whether the bond was to be executed in New York or Kentucky. *Kentucky v. Bosaford*, 6 Hill (N. Y.) 526. The order accompanied by the purchase money for the tickets was sent from the city of Carthage, in this state, to the lottery company at New Orleans, in the state of Louisiana, where the same were received, and from where the tickets were sent by mail to Kuhn, who was acting for the plaintiff, as well as for Bathurst and himself. In *Case v. Ricker*, 10

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Vt. 480, Mr. Justice COLLAMER, who delivered the opinion of the court, remarked: "The sale of foreign lottery tickets in this state being forbidden under severe penalties, the question is, whether the pay can be recovered here for tickets sold in another state to be brought into this state for sale. The defendant ordered the tickets sent by mail, and they were so sent from Rhode Island. This was a sale and delivery in Rhode Island. The ticket vested in defendant when mailed, as much as if delivered to him personally there." By the statute of Michigan, all contracts for debts for liquor were declared illegal, and not enforceable in that state. In *Kling v. Feris*, 33 Mich. 275, the plaintiff, who was a wholesale liquor dealer in Cleveland, Ohio, where the sale of liquors was unrestricted by prohibitory laws, sent his agent to the state of Michigan, who there exhibited samples to defendant, and took his order there, subject, however, to its acceptance by the plaintiff in Cleveland. The order thus given was sent by the agent to plaintiff in Cleveland, who accepted the same. The supreme court held, that, upon the state of facts, that as the sale was not completed in Michigan, where it would have been an illegal contract, but in the state of Ohio, by its acceptance there, it was valid and enforceable. In *State v. Shaeffer*, 89 Mo. 271, which was a prosecution by indictment for obtaining money and property by false representations, it was held that the place where the money or property is obtained, without regard to where the representations were made, is the place in which the party should be prosecuted. In *Jamison v. Gregory, Ex'r*, 4 Met. 363, the court of appeals of Kentucky quote with approval what was said in *McIntyre v. Parks*, 3 Metcalf (Mass.) 207, which was to the effect that, where a letter was written and sent from Boston to the vendors at New York, the contract must be regarded as having been made in the latter state, and its legality tested by the laws in force there,

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citing *Holman v. Johnson*, Cowper, 391, *supra; Pelicot v. Angel*, 2 Cromp. Mus. & Ros. 311; *Shotwell v. Hughes*, 1 Curtis, 244. These authorities make it quite plain, that the place of the transaction of the plaintiff and his associates, in respect to the lottery tickets, was made in the state of Louisiana, so that by reason thereof they were guilty of no infraction of the laws of this state. As was said in *McIntyre v. Parks*, 3 Met. (Mass.) *supra*, the sale of a lottery ticket *made in another state, where such sale is lawful to a citizen of the state, where such sale is prohibited by statute, is a valid transaction.*

After the purchase and receipt of the ticket, and the drawing of the prize by one of these tickets, the plaintiff and his associates in this state, as the owners of the lucky tickets, were, in legal contemplation, in a situation not different from that of being the owners of a certificate of deposit payable to bearer for $5,000 on an incorporated banking institution in the city of New Orleans. In either case the courts of that state would have been open to them, and would have lent them their assistance in the collection of the amount due on the contract. Now whether Kuhn, or the defendant, collected from the lottery company the prize money, would make no difference as to plaintiff; for it is not pretended that defendant had in any way acquired any right, title or interest in so much of said prize money as the plaintiff was entitled by reason of being the joint and equal owner of one-third of the ticket drawing the same. The defendant having received of the lottery company the plaintiff's one-third interest in the prize money, the question now is, can she be permitted to retain the same as against the plaintiff in this action for money had and received by her to his use? She asserts no valid legal title to the money as against plaintiff, but invokes, and relies for her defense, against the plaintiff's claim, upon the principles of the maxim: "*In pari delicto potior est*

conditio defendentis et possidentis." But as it was said in *Kitchen v. Greenbaum*, *supra*, this maxim is not of universal prevalence. It has manifestly no application to the facts upon which the plaintiff's claim is founded, because it is not connected with an illegal transaction, nor does its establishment show that he has broken the law. If the defendant can withhold this money which she has received for the plaintiff's use, then a bank or express company, whose agency might be employed in collecting it from the lottery company, could on the same grounds retain it as against the plaintiff. The lottery company, too, could decline payment, and the courts would not lend assistance to plaintiff in coercing payment. But, as we have said, the transaction was valid by the statutes and jurisprudence of the state where it was made, and would be upheld by the courts there. *Antoine v. Smith*, 40 La. Ann. 560.

The contract in issue was executed, and the courts with great unanimity have held that, in such cases, they will protect the result. *Cohn v. Rinker*, 34 Fed. Rep. 472; *Kentucky v. Bassford*, 6 Hill (N. Y.) 526; *Stix v. Matthews*, 63 Mo. 37; *Roach v. Type Foundry*, 21 Mo. App. 118; *McGrow v. Hamlin*, 29 Mich. 476; *Antoine v. Smith*, 40 La. Ann. 560; *McIntyre v. Parks*, 3 Metcalf. (Mass.) 207; *Jameson v. Gregory*, 4 Met. (Ky.) 370.

But if the original transaction between the parties thereto is held to be tainted with illegality, so that it would not have been directly enforced by the courts of this state, still since it is shown to have been executed, and the money paid into the defendant's hand, she cannot use such illegality as a shield to protect herself against the claim of the plaintiff, for whose use it was by her collected. *McBlair v. Gibbs*, 17 How. (U. S.) 232; *Armstrong v. Toler*, 11 Wheaton, 258; *Brooks v. Martin*, 2 Wall. 70; *Warren v. Hewitt*, 45 Ga. 501; *DeLeon v. Trevine*, 49 Texas, 88; *Planters' Bank v. Bank*, 16 Wall. 483.

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In this case the contract between plaintiff and the lottery company had been fully executed. The money had been collected from the company by defendant, and she now refuses to pay it over to the plaintiff, because, she contends, the executed contract was infected with illegality. This, it seems to us, she will not be permitted to do.

A question very similar to this arose in the case of *McBlair v. Gibbs*, 17 How., *supra*, where it was said, "Even if the money be paid to a third person for the other party, such third person cannot set up the illegality of the contract on which the payment has been made and withhold it for himself." In the case of *Brooks v. Martin*, 2 Wall. already cited, the supreme court of the United States announced itself quite satisfied that the doctrine stated in *McBlair v. Gibbs* was sound. *Planter's Bank v. Union Bank*, 16 Wall. 483, approbates the same doctrine. In *Tenant v. Elliott*, 1 B. & P. 3, a broker effected an insurance which was illegal, being in violation of the navigation laws, and, on a loss happening, the underwriters paid the money to the broker, who refused to pay it to the assured, setting up the illegality of the insurance. The insured recovered on the ground that the implied promise of the broker, arising out of the receipt of the money for the insured, was a new contract, and not affected by the illegality of the original transaction. And the same principle was applied and enforced in *Farmer v. Russell*, 1 B. & P. 296. *Cohn v. Rinker*, 34 Fed. Rep. 472, was a case decided in the circuit court of the United States for the western division of the western district of Missouri, where the plaintiff and defendant made a joint purchase of a ticket in the Louisiana State Lottery Company, which drew a prize of $75,000. The defendant collected of the lottery company, and refused to pay over to the plaintiff his share thereof, upon the ground that both parties were citizens of the state of Missouri at the time of the transaction, and that the constitution and laws

of that state prohibited the dealing in lottery tickets. The plaintiff, in the action for money had and received, was permitted to recover, notwithstanding the defense which we have already stated.

The defendant places her main reliance upon the case of *Goodrich v. Houghton*, 9 N. Y. 214, where two joint owners purchased a ticket in the Louisiana lottery, which drew a prize, and one of them received the money which he refused to divide with the other, although he had promised to do so. In an action on this promise, the court held the plaintiff could not recover because it had reference to the original bargain, which was illegal, and afforded no basis for recovery of the plaintiff's share of the money. This decision would seem to conflict with that in 6 Hill already referred to. It may have been influenced by the statute of New York, which had been enacted since the latter decision, and which provided amongst other things, that the provision of the chapter should be applicable to lotteries drawn or to be drawn out of the state, whether authorized or not by the law of the state where they were drawn or to be drawn, in the same manner as to lotteries drawn or to be drawn within the state. R. S. N. Y. Penal Code, ch. 8, p. 68. But whether this decision was because of the statute of that state or not, we may observe that, if the original purchase of the lottery ticket by the plaintiff was legal, as we think was the case, then the decision is not in point here; if, however, on the other hand, the transaction, including the purchase of the ticket, was invalid, yet, inasmuch as it is an executed transaction and the proceeds thereof have been paid into the hands of the defendant for the use of the plaintiff, then, we think, there is an implied promise on the part of the defendant to pay over such proceeds to the plaintiff, and, in this action for money had and received, that she cannot be heard to plead in excuse for non-payment thereof the original taint of illegality. This view, we think, is sustained by the authorities

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referred to in a preceding paragraph, and the principles and warnings of these authorities, whether in conflict with the 9 N. Y., *supra*, or not, have the approbation of our judgment, and will be applied and followed in our ruling in this case. We do not, therefore, think that, with the possible exception of the case in 9 N. Y., that any of the cases upon which the defendant relies lend authoritative support to the theory of her defense.

In most, if not in all, of these, the plaintiff was either compelled to prove an illegal contract in order to establish his claim, or the action arose *ex turpi causa*, or from the transgression of a positive law of the state where the same was brought. We think we have demonstrated that the petition states a good cause of action, and it is not subject to the objections that the defendant has lodged against it.

The defendant objected to the introduction of the statutes of Louisiana in evidence, for the reason that the same had not been pleaded. The record does not disclose that this objection was interposed in the court below, and hence cannot be raised here for the first time. Besides, the plaintiff's action was not based directly on this statute, it being for money had and received by defendant, for the plaintiff's use, hence it was unnecessary to plead it. The evidence was submitted to the court, whose finding seems fully justified by it. The judgment must be affirmed. All concur.

ON MOTION FOR REHEARING.

SMITH, P. J.—An agreement entered into in this state to purchase a lottery ticket in another state does not fall within the prohibition of the statute of this state in reference to lotteries. R. S. 1889, sec. 3833. The purchase in this case was not made in this state, but in the state of Louisiana where it was entirely legal. We prohibit the making of certain contracts in this state; we

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do not undertake to give our laws any extra territorial operation. New York, by its statute, prohibits lottery advertisements. A contract made in that state to advertise a lottery in other states, where such advertisements were not prohibited, was held not to be illegal, and that the statute against lotteries was in no manner infringed. *Ormes v. Danchey*, 82 N. Y. 443; *People v. Nollke*, 94 N. Y. 137.

The allegation of the facts which led up to the transaction of the purchase of the lottery tickets in this case was, perhaps, necessary to show the title of the plaintiff to an interest in the prize money which the defendant had received in part for his use.

Whether the plaintiff applied by letter or in person to the lottery company or at its office in the state of Louisiana, is immaterial, for the reason, that in either case the minds of the plaintiff and the lottery company, a legal entity, there first met, and it was there the contract was made. It was under this contract that the defendant was paid the prize money which she now seeks to retain, because it was a wagering contract which the courts will not lend their aid in enforcing. The agreement to purchase the tickets infringed no statute of this state, nor did the purchase of the tickets in the state of Louisiana, so it is quite difficult to see why the plaintiff's cause of action cannot be sustained in this state. *Funk v. Galliger*, 49 Conn. 124, is exactly in line with *Kitchen v. Greenbaum*, 61 Mo. 110, and decides no more than is there decided. It was a case where a claim was made for property under a title derived through a lottery transaction which had taken place in violation of the statute of Connecticut. The case is in no respect analogous to this, and we think it is wholly inapplicable to it, and the same remark is equally applicable to the case of *Watson v. Fletcher*, 7 Gratt. 1.

The case of *Watson v. Murray*, 23 N. J. Eq. 257, goes far towards upholding the defendant's contention.

It declares lotteries to be *mala in se*, while the supreme court of the United States declares them in legal acceptance of the term *mala prohibita*. *Stone v. Mississippi*, 101 U. S. 814; *Ewell v. Doggs*, 108 U. S. 143. *Malum prohibitum* is defined in Anderson's Law Dictionary, 650, to be an act made wrong by legislation—a forbidden evil. The whole opinion proceeds upon an idea that lotteries are *mala in se*, and, therefore, the courts of justice are nowhere bound to accord to contracts respecting them any validity, though valid in the jurisdiction where made. This ruling stands opposed to the well-established current of judicial decision, as we have seen from the cases referred to in the opinion in respect to the interpretation of contracts, that, though prohibited by the laws where it was sought to enforce them, they were valid in the states where made. In the state of Massachusetts slavery was declared to be contrary to natural right, the principles of justice and sound policy. In *Com. v. Aves*, 19 Pick. 215, Chief Justice SHAW, in delivering the opinion of the court, declared that a note given in the state of Louisiana for the purchase price of a slave could be enforced in that state because legal by the laws of the state where made. It was further remarked in the same connection by this eminent judge, that, if a state saw fit to establish slavery by law, "we are bound to take notice of the existence of those laws, and we are not at liberty to declare and hold an act done within their limits unlawful and void upon our views of morality and policy, which the sovereign power and legislature has pronounced lawful." And to the same effect is *Greenwood v. Curtis*, 6 Mass. 358.

While the question presented is very close, and one of great nicety, we think the law is with the plaintiff. After giving the points and authorities cited in support thereof in the brief of the counsel for the defendant the most attentive consideration, we feel constrained to adhere to the conclusion announced in the opinion.

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EMILIE MOECKEL, Respondent, v. JOSEPH J. HEIM *et al.*, Appellants.

Kansas City Court of Appeals, February 2 and July 2, 1891.

1. **Married Women:** INDORSEMENT OF PROMISSORY NOTE. A married woman is not *sui juris*, and she cannot make a contract of indorsement, either in express terms or by implication.

2. ——— : ——— : STATUTE : HUSBAND'S BENEFIT : COLLECTION. The statute not only requires express assent for the husband to sell, incumber or otherwise dispose of the wife's property, but the assent, in order that the property may become the husband's, must also be that he dispose of it for his own use and benefit; and her mere signature on the back of a note is, at most, an assent that he might collect the money due thereon for her. But whether this would be express assent, *quære*.

3. ——— : SURETY FOR HUSBAND CHARGES HER SEPARATE ESTATE : CREDITOR'S RIGHTS IN EQUITY. Plaintiff, a married woman, signed her husband's note as surety. The husband without authority pledged notes indorsed by the wife—her separate property—as collateral security for his note. Plaintiff then brings her bill in equity against her husband's creditors—the holders of her husband's note—to recover her notes so pledged as collateral. *Held:*—

   (1) In becoming surety for her husband, plaintiff charged her separate estate.

   (2) The husband's note on which she is surety, chargeable on the notes plaintiff is seeking to recover in this action, may be interposed in defense of the action, if properly set up.

Appeal from the Jackson Circuit Court.—HON. J. H. SLOVER, Judge.

REVERSED AND REMANDED.

Warner, Dean & Hagerman, for appellants.

The indorsement of the notes in which she had a statutory separate estate by the wife in blank, and the

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delivery of them to her husband, was a sufficient assent in writing by the wife under the statute, and gave the husband full authority to sell, incumber or otherwise dispose of the notes for his own use and benefit. *Rodgers v. Bank*, 69 Mo. 564; *Coal Co. v. Coal Co.*, 8 Wallace, 288; *Long v. Strauss*, 107 Ind. 94; 4 W. Rep. 239; *Smythe v. Scott*, 3 W. Rep. 746; Benjamin's Chalmers' Digest, p. 123; *Fitzgerald v. Baker*, 96 Mo. 661; Tiedeman on Commercial Paper, sec. 167.

Kagy & Bremermann, for respondent.

(1) The statute, section 6869, is explicit that the respondent's notes shall not be deemed to have been reduced to possession by the husband by his use, occupancy, care or protection thereof, but the same shall remain her separate property, unless, by the terms of said assent in writing, full authority shall have been given by the wife to the husband to sell, incumber or otherwise dispose of the same for his own use and benefit. From this seven things follow *ex necessitate: First.* There must be a writing. *Second.* There must be an assent in the writing. *Third.* This writing must contain the terms ot the assent, setting forth the grant of authority, in words, not by implications. *Fourth.* The terms of the writing must set forth the authority in full, and explicitly, so that it may be seen that no restriction whatever has been placed upon it by the wife and no reservation made by her. *Fifth.* The express terms of the writing must plainly show full and absolute authority given to the husband and to him alone, the wife relinquishing all claim. *Sixth.* By the express terms of the writing it must be stated whether he has authority to sell, or to incumber, or in what manner he may dispose of the property. The mode must be pointed out. *Rodgers v. Bank*, 69 Mo. 560; *McCoy v. Hyatt*, 80 Mo. 136; *Broughton v. Brand*, 94 Mo. 174; *Gilliland v.*

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Gilliland, 96 Mo. 524; *Reiper v. Reiper*, 79 Mo. 352; *Watson v. Smelting & Refining Co.*, 8 Mo. App. 604; *Franc v. Nidlinger*, 41 O. St. 298; *Farmers' Ex. v. Farmer*, 39 N. J. Eq. 211; *Parker v. Wimbily*, 78 Ala. 64; *Clark v. Clark*, 45 N. W. Rep. (Wis.) 121; *Linderman v. Farquharson*, 101 N. Y. 434. (2) "An act evidencing intention is said to be express when it is done with the direct object of communicating the intention, as opposed to implication." Rapalje, p. 488. "Express,—given in direct terms; not implied or left to inference." Webster. "*Expressum facit cessare tacitum.*" *Mill Co. v. Brundage*, 25 Mo. App. 269; *Coal Co. v. Coal Co.*, 8 Wallace, 288; *Long v. Strauss*, 107 Ind. 94. (3) That a married woman may execute a note and thereby bind her separate estate. *Turner v. Shaw*, 96 Mo. 22; *Kimm v. Weippert*, 46 Mo. 532. It may also be charged for her contracts of suretyship for the benefit of another; but, in the latter case, if the contract is in writing, and is not directly for the benefit of her separate estate, the intention to make it liable should appear in the writing itself. *Yale v. Dederer*, 18 N. Y. 265; *Putnam v. Tennyson*, 50 Ind. 456; *Penn v. Young*, 10 Bush (Ky.) 626; *Wilson v. Jones*, 46 Md. 349; *Perkins v. Elliott*, 23 N. J. 526; *Elliott v. Gower*, 12 R. I. 79; *Dale v. Robertson*, 51 Vt. 20. With regard to such contracts no intent is generally presumed. *Melton v. Brown*, 47 Mo. 504; *Boeckler v. McGowan*, 9 Mo. App. 373; *Bank v. Taylor*, 53 Mo. 444; *Clark v. Bank*, 47 Mo. 16; *Burnley v. Thomas*, 63 Mo. 360; *Eystra v. Cappelle*, 61 Mo. 378; *Gage v. Gates*, 62 Mo. 412; *Davis v. Smith*, 75 Mo. 219; *Klenke v. Kletz*, 75 Mo. 239; *Bank v. Collins*, 75 Mo. 280; *Staley v. Howard*, 7 Mo. App. 377; *DeBaum v. Van Wagoner*, 56 Mo. 347; *Gay v. Ihm*, 69 Mo. 584; *Horton v. Ransom*, 6 Mo. App. 19; *Morrison v. Thistle*, 67 Mo. 596; *Nash v. Norment*, 5 Mo. App. 545; *Dameron v. Jamison*, 4 Mo. App. 299; *Pratt v. Eaton*, 65 Mo. 157; *Maguire v. Maguire*, 3 Mo. App. 458; *Myers*

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v. Van Wagoner, 56 Mo. 115; *Lincoln v. Rowe*, 51 Mo. 571; *Kimm v. Weippert*, 46 Mo. 532; *Schafroth v. Ambs*, 46 Mo. 114; *Pemberton v. Johnson*, 46 Mo. 542; 3 Pom. Eq., secs. 1121–1126. A bill or note given by a married woman for her husband's debt will not render her liable although she may have a separate estate. 1 Randolph's Com. Pap. [Ed. 1886.] sec. 289, where Missouri rule is stated; *Williamson v. Hayward*, 117 Mass. 532; *Ross v. Walker*, 31 Mich. 120; *Alger v. Scott*, 54 N. Y. 14; *Emery v. Lord*, 26 Mich. 431; *Hetherington v. Hixon*, 46 Ala. 297; *McClure v. Harris*, 7 Heisk. 379; *Hansell v. Dewitt*, 63 Barb. 53. Such note given for the husband's debt, already existing, is void. Randolph's Com. Pap., sec. 289, *supra; Wilhelm v. Schmidt*, 84 Ill. 183. Her separate estate is not liable in the absence of separate benefit. Randolph's Com. Pap., sec. 313. Without separate benefit, no intention to charge separate estate presumed. Randolph's Com. Pap., secs. 307, 308. The contract is absolutely void at law, and equity will not charge her separate estate where she has received no benefit. Brandt on Sure. & Guar., sec. 4; *Yale v. Dederer*, 18 N. Y. 265; *Perkins v. Elliott*, 8 C. E. Green. (N. J.) 526; *Machine Co. v. Fuller*, 107 Mass. 437; *West v. Laraway*, 28 Mich. 464. (4) The court below was the sole judge of the weight of evidence, and every presumption will be made in favor of the correctness of the ruling. The finding of the chancellor in equity cases will be deferred to unless the court has manifestly disregarded the evidence, and this is especially so where the evidence is conflicting. *Welch v. St. Louis*, 73 Mo. 73; *Anderson v. Shockley*, 87 Mo. 255; *Hulert v. Small*, 52 Mo. 525; *Tough v. Montgomery*, 5 Mo. 529; *Chouteau v. Allen*, 70 Mo. 336; *Sayer v. Devore*, 99 Neb. 436; *Robertson v. Reed*, 38 Mo. App. 32; *Chapman v. McIlwrath*, 77 Mo. 38; *Snell v. Harrison*, 83 Mo. 652; *Erskine v. Lowenstein*, 82 Mo. 301, 309.

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Warner, Dean & Hagerman, for rehearing.

(1) That a wife can become surety for her husband has long been a recognized rule of law in this state. *Lincoln v. Rowe*, 51 Mo. 572; *Bank v. Taylor*, 62 Mo. 338; *Blair v. Railroad*, 89 Mo.; *Bank v. Collins*, 75 Mo. 280; *Kimm v. Weippert*, 46 Mo. 532, and cases cited; *Siemers v. Kleeburg*, 56 Mo. 196; *DeBaum v. Van Wagoner*, 56 Mo. 347; *Schafroth v. Ambs*, 46 Mo. 114; *Whitesides v. Cannon*, 23 Mo. 457; *Morrison v. Thistle*, 67 Mo. 596; *McQuie v. Peay*, 58 Mo. 56; 2 Story's Eq Jur., secs. 1390, 1393; *Daily v. Mfg. Co.*, 88 Mo. 301; Reeves' Dom. Rel., pp. 236, 237. (2) If, then, our argument is correct, that the wife is bound by her own act in executing the note made by herself and husband to the defendant company, can she maintain this action in equity to recover back the proceeds derived from the collaterals which are admitted by the pleadings to be her separate property, and which are equitably chargeable with the payment of the debt which she contracted in favor of the defendant? It is a very old rule of law that a party appealing to a court of equity must first do equity. It is also a well-established rule of law that a party can do voluntarily what the law would require him to do. It is also a well-established rule of law that a party cannot recover back from another what he is legally or equitably bound to pay over to him. *Montgomery v. Machine Works*, 92 U. S. 257; 1 Bishop, sec. 120; *Thomas v. Kennedy*, 24 Iowa, 379; Story's Eq. Jur., secs. 979, 1266; *Wardwell v. McDowell*, 31 Ill. 375; *Hardy v. Summers*, 10 Gill & J. 316; 32 Am. Dec. 167; *Calhoun v. Hays*, 8 Watts & S. 127; 42 Am. Dec. 275; *Bryan v. Stump*, 8 Gratt. 241; 56 Am. Dec. 139; Freeman on Cotenancy and Partition, sec. 412; *Saveland v. Green*, 36 Wis. 612; *Bumgardner v. Edwards*, 85 Ind. 126.

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Ellison, J.—This action was instituted by filing a bill in equity which in effect charges defendant with the conversion of two promissory notes, the separate property of plaintiff, who is a married woman. Plaintiff had a decree in the circuit court giving her judgment for the amount of the notes subject to be satisfied by a return of the notes unpaid in sixty days, otherwise the judgment should be absolute and execution would issue. It appears from the evidence that plaintiff owned the notes, one for the sum of $375, dated April 2, 1887, and the other for the sum of $600, dated April 12, 1887, both of which were her sole and separate property; that she indorsed them in blank soon after she became the owner, and on or about the ninth day of July, 1887, delivered them to her husband, Bruno Moeckel. The plaintiff's husband, while in the employment of the defendants, became indebted to them in the neighborhood of $1,200, for the payment of which defendants were pressing him, and, in order to get further time and avoid litigation, he, together with the plaintiff, on the fourteenth day of June, 1887, executed and delivered a certain promissory note for the sum of $1,100 to the Ferd-Heim Brewing Company, and, to secure the payment of said note, the husband delivered as collateral security the two notes which had been indorsed in blank by plaintiff and delivered to him. It further appears from the evidence that the defendants had no notice whatever of the manner in which the husband got possession of the notes, or the purpose for which plaintiff delivered them to him. The foregoing states the facts in a short way, but as broadly for the defendants as the case will allow; and the question presented is, was there such a reduction to possession by the husband as gave him the power of disposal of the notes? That portion of the statute relating to the matter is as follows: "This section shall not affect the title of any husband to any personal property reduced to his possession with the

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express assent of his wife: *Provided*, that said personal property shall not be deemed to have been reduced to possession by the husband by his use, occupancy, care and protection thereof, but the same shall remain her separate property, unless by the terms of said assent, in writing, full authoritity shall have been given by the wife to the husband to sell, incumber or otherwise dispose of the same for his own use and benefit." R. S. 1889, sec. 6819.

Defendants' contention is that the name written across the back of the note was an indorsement thereof as understood in commercial law. That in writing her name on the back of the notes she has said, *first*, that, "I hereby assign these notes to the bearer;" *second*, that "I hereby undertake that if these notes be dishonored I, on receiving due notice thereof, will indemnify the bearer." That, therefore, plaintiff did, in writing, give express assent and full authority to her husband to dispose of the notes for his own use and benefit. The result of this contention is, that the writing of her name across the back of a note by a married woman operates as a contract of indorsement with its implications and intendments. We are not of this opinion. A married woman is not *sui juris*. She cannot make a contract of indorsement. *Bachman v. Lewis*, 27 Mo. App. 81. If she had written on the note the words of defendants' second contention, they could not have been enforced against her. It is quite apparent that, if she could not make a contract of indorsement in express terms, she could not by any implication. But for the law peculiar to the indorsement of commercial paper the mere writing of one's name on the back of a note would amount to nothing. By force of the law, the writing on the back of a note implies a certain contract, but it never implies it to one not capacitated to make it. It does not imply authority in the holder to fill out a contract over the signature which the signer could not make. It is not pretended that the object

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plaintiff had in writing her name on the notes was for the specific purpose of enabling her husband to deliver them for his own use and benefit to the defendants. Nor will we say that if such had been her intention that it would have been sufficient. The contention is, or the result of the contention is, that such is the legal effect of the act. By reference to the authorities cited in plaintiff's brief it will be seen that the statute here considered has been construed, in the cases arising under it, in keeping with its express terms. The judgment is affirmed. All concur.

ON REHEARING.

ELLISON, J.—But if we are wrong in the foregoing there is another view which will still determine the point against defendant. In order that the property may become the husband's, the statute (quoted above) not only requires express assent in writing for the husband to sell, incumber or otherwise dispose of the wife's property, but the assent must *also* be that he may so dispose of it for his *own use* and *benefit.* If the terms of the assent are only that he may dispose of it he would be merely her agent. But when he attempts to use it for himself her express assent must be given that he may so do. The most that we could allow for her mere signature on the back of these notes is that it was an assent that he might collect the money due thereon for her. But whether even this would be *express* assent we do not decide. The Ohio statute is similar to ours except the assent is not required to be "express" or in writing; and in *Franc v. Nidlinger*, 41 Ohio St. 298, it was held that the indorsement and delivery of a draft to the husband did not constitute the necessary assent. "It was a consent that he might collect the money, but not that he might do so for his own use and benefit." *Farmer v. Farmer*, 39 N. J. Eq. 211.

We come now to another point made by defendant which has given us some difficulty. Plaintiff executed

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to defendants a note with her husband and as his surety. And from this defendants contend that as they have a right in equity to charge plaintiff's separate estate with this note, they should not now be made (at the hand of a court of equity) to pay the notes which plaintiff charges they have converted, since they being her own estate are liable in equity to be charged with her note executed as aforesaid. But it is insisted that the wife cannot charge her separate estate by executing a note wherein she is a surety, unless it appears from the terms of the note that she intends so to do. This is not the law in this state. By executing the note, the presumption of law is that she intended to charge her separate estate unless the contrary intention appears from the paper. *Coates v. Robinson*, 10 Mo. 757; *Whitesides v. Cannon*, 23 Mo. 457, 472; *Miller v. Brown*, 47 Mo. 504, 513; *Kimm v. Weippert*, 46 Mo. 532, 545. And, though she sign with her husband as his surety, the same rule applies. 2 Story Eq., sec. 1401; *Metropolitan Bank v. Taylor*, 62 Mo. 338; *Lincoln v. Rowe*, 51 Mo. 571. And any intention not to charge her separate property in such case must, as in other cases, appear from the note itself, else it will be of no avail. *Metropolitan Bank v. Taylor, supra.* So, therefore, the note here referred to is properly chargeable on her separate estate unless its execution was procured by fraud. Our opinion, therefore, is that such note may be interposed by defendants in defense if it be set up in a proper answer. We can see no good or sufficient reason why this should not be permitted. Plaintiff is asking a court of equity to decree to her the notes or their value, they being her separate estate. Defendants have a claim which, in equity, is chargeable upon these notes, and they ought to be permitted to assert it in a court of equity.

The judgment will be reversed and the cause remanded and tried as herein indicated. All concur.

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Bernhard Tegler, Respondent, v. **J. A. Mitchell**, Appellant.

Kansas City Court of Appeals, July 2, 1891.

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1. **Unlawful Detainer: insufficient verification of complaint: amendment.** A complaint in unlawful detainer which has been insufficiently verified may, after appeal, be amended in the circuit court.

2. ——— : **complaint: land in state.** A complaint in unlawful detainer which fails to show that the land is in the state of Missouri is insufficient and confers no jurisdiction.

Appeal from the Jackson Circuit Court.—Hon. R. H. Field, Judge.

Reversed.

J. B. Hamner, for appellant.

(1) The court erred in allowing plaintiff to file an amended complaint, because the one originally filed was not verified, and, the justice having no jurisdiction, the circuit court could not acquire jurisdiction on appeal of unlawful detainer. *Reilly v. Powell*, 34 Mo. App. 431; *Fletcher v. Keyte*, 66 Mo. 285; *Turner v. Bondalier*, 31 Mo. App. 582. (2) The court erred in permitting the introduction of any evidence in this cause, because said amended petition does not allege that said premises were or are in the state of Missouri. *McKinney v. Harral*, 31 Mo. App. 41.

J. W. Gillespie, for respondent.

(1) The trial court committed no error in allowing the amended complaint to be filed. *Ensworth v. Barton*, 67 Mo. 622. The right to supply omissions or correct errors in proceedings or statements before justices of

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the peace on appeal to the circuit court, even where such errors or omissions are jurisdictional, has been abundantly upheld in this state. *Mitchell v. Railroad*, 82 Mo. 108; *Vaughn v. Railroad*, 17 Mo. App. 8. In *Reilly v. Powell*, 34 Mo. App. 431, cited by appellant, the complaint was not amended nor asked to be amended in the circuit court. The question of the right to amend in the trial court was not passed on in that case. (2) An examination of the amended complaint will show that it therein sufficiently appears that the premises in controversy are situated in this state.

Ellison, J.—This action is unlawful detainer. The affidavit to the complaint was insufficient in that the affiant swore that it was true "in substance." *Reilly v. Powell*, 34 Mo. App. 431. But on appeal to the circuit court, pending a motion to dismiss, the complaint was permitted to be amended by appending thereto a proper affidavit. This was rightfully allowed. R. S. 1889, sec. 5153. In *Reilly v. Powell*, no amendment was made or offered. The case of *Turner v. Bondalier*, 31 Mo. App. 582, is not applicable. The affiant in that case was a stranger to the proceedings at the time of making the affidavit. He made it as the agent of the plaintiff, and it was held that, as the plaintiff was an infant, he could not appoint an agent for such purpose. It was considered, therefore, that there was no affidavit in the case.

There is a further objection, however, which seems to be fatal to plaintiff's case. The complaint does not allege the property detained to be in the state of Missouri. This case is one in which exclusive original jurisdiction is vested in justices of the peace, a court of inferior jurisdiction. We can indulge in no presumptions as to such jurisdiction. *McQuoid v. Lamb*, 19 Mo. App. 153; *Schell v. Leland*, 45 Mo. 289. As, by section 5091, Revised Statutes, 1889, a justice has jurisdiction only of lands in his county, and as it could not

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be pretended that a justice would have jurisdiction of a case which failed to show the land detained to be in the county, we see no reason why it should not also appear to be in the state. It, therefore, not appearing anywhere in the record that the premises are in the state of Missouri, the justice had no jurisdiction, and we will reverse the judgment and dismiss the cause. All concur.

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JAMES CARR, Appellant, v. A. C. DAWES, Respondent.*

Kansas City Court of Appeals, November 10, 1890.†

1. **Trial Practice**: BILL OF DISCOVERY: PARTY AS WITNESS: CONTEMPT: PLEADING STRUCK OUT. Though the bill of discovery as known to the old chancery practice is abolished, yet, under the statute, a party to a civil action may compel the adverse party to testify as a witness, and if he, on being duly commanded, refuse to attend and testify either in court or before any person authorized to take his deposition, besides being punished himself for contempt, his petition, answer or reply may be rejected, and judgment rendered against him.

2. ——: CONTEMPT; SETTING ASIDE JUDGMENT: DISCRETION OF TRIAL COURT. While, as regards the contempt, the matter is wholly between the court and the contemptuous party, and the court may, in the exercise of its discretion, set aside its judgment, such discretion is the subject of review; but the party seeking to vacate such judgment must show it was either illegal, or else that it should be set aside because the court's discretion was oppressively exercised.

3. ——: MOTION TO SET ASIDE JUDGMENT: DILIGENCE AND MERITS. Plaintiff sued defendant on a promissory note; the defense was the statute of limitations. The reply was an avoidance of the statute. Plaintiff had two subpœnas served upon defendant, who did not appear at the trial, either in person or by attorney. Thereupon the court struck out his answer and rendered judgment. Fifty-six days after at the same term, defendant filed an affidavit

*For opinions on motion for rehearing, see *post*, p. 598.
†This case did not reach the reporter until July 13, 1891.

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to set aside the judgment on the ground that pressure of business prevented his attendance, without stating the business and its nature, but alleging his defense was good in law and fact. The affidavit of his attorney also filed stated he was attending to his duty in the legislature, and had at a prior term agreed to continue the cause, and had, therefore, not notified defendant he would be absent. The court sustained the motion, and set aside the judgment. *Held*, error, as it is the duty of the courts to so construe pleadings, and to so adapt the practice as to discourage negligence, deceit and delay; and such applications should show merits as well as diligence, and the statute of limitations is a technical and not a meritorious defense.

Appeal from the Buchanan Circuit Court.—Hon. Oliver M. Spencer, Judge.

Reversed and remanded (*with directions*).

Allen H. Vories, for appellant.

(1) Appellant's avoidance of the statute was good. R. S. 1879, sec. 3236; *Rhodes v. Farish*, 16 Mo. App. 430; *Adams, Adm'r, v. Abernathy*, 37 Mo. 196; *Johnson v. Smith*, 43 Mo. 499; *Miller v. Tyler*, 61 Mo. 401. (2) Defendant's answer to a bill of discovery is evidence in support of the allegations in his bill. 2 Daniels' Ch. Pl. & Prac. [5 Ed.] 1537; Story, Eq., sec. 1483. The code of civil procedure has abolished the distinction in practice between law and equity, and with it the bill of discovery. *Bond v. Worley*, 26 Mo. 253. And it has substituted for the bill of discovery the right to make the adverse party a witness, and to compel him to testify in behalf of the party subpœnaing him. R. S. 1879, sec. 4012; *Eck v. Hatcher*, 58 Mo. 235; *Cornet v. Bertelsman*, 61 Mo. 118. (3) The respondent having been twice duly summoned as a witness on behalf of appellant, and refused to attend, the court did right in striking out his answer and rendering judgment against him for the principal and interest of the note sued on. R. S. 1879, sec. 4016; *Haskell v. Sullivan*, 31 Mo. 435; *Snyder v. Raab*, 40 Mo. 167; *Harris v. Harris*, 25 Mo.

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567. (4) The respondent's affidavit is fatally defective in not stating facts excusing his disobedience of the court's subpœna. *Biebinger v. Taylor*, 64 Mo. 63; *Pry v. Railroad*, 77 Mo. 123; *Lamb v. Nelson*, 34 Mo. 501; *Florez v. Uhrig's Adm'r*, 35 Mo. 517; *Leabo v. Goode*, 67 Mo. 132; *Butts v. Phelps*, 79 Mo. 304; *Weil v. Posten*, 77 Mo. 284; *Brooks v. Mastin*, 69 Mo. 58; *Mitchell v. City of Clinton*, 99 Mo. 153; *Stearns v. Railroad*, 94 Mo. 320; *Seeley v. English*, 17 Barb. 530; *Implement Co. v. Wheeler*, 27 Mo. App. 16. (5) How is this "good cause shown" to the court? By filing the affidavit of the party himself showing two things, viz.: *First*, the exercise of reasonable diligence on his part in preparing his answer. *Second*, a meritorious defense to the plaintiff's cause of action. If he fails in his affidavit to affirmatively show both, the trial court, under many decisions of the supreme court, commencing with *Meechum v. Judy*, 4 Mo. 361, is not warranted in granting him a new trial. *Biebinger v. Taylor*, 64 Mo. 63; *Pry v. Railroad*, 73 Mo. 123; *Lane v. Nelson*, 34 Mo. 252; *Meechum v. Judy*, 4 Mo. 361; *Elliott v. Leak*, 4 Mo. 540; *Lecompte v. Wash*, 4 Mo. 557; *Weimer v. Norris*, 7 Mo. 6; *Greene v. Goodloe*, 7 Mo. 26; *Field v. Matson*, 8 Mo. 686; *Kirby v. Chadwell*, 10 Mo. 392; *Austin v. Nelson*, 11 Mo. 192; *Faber v. Bruner*, 13 Mo. 541; *Campbell v. Gaston*, 29 Mo. 343; *Gehrke v. Jod*, 59 Mo. 522; *Owen v. Tinsley*, 21 Mo. 425; *Adams v. Hickam*, 43 Mo. 168; *Castlio v. Bishop*, 51 Mo. 162; *Greer v. Parker*, 85 Mo. 107; *Houck v. St. Louis Exposition*, 28 Mo. App. 630; *Bosbyshell v. Summers*, 40 Mo. 172.

Lancaster, Hall & Pike, for respondent.

(1) In this state the circuit courts have the common-law power to vacate their own judgments during the term when rendered. *Randolph v. Sloan*, 58 Mo. 155; *State ex rel. v. Adams*, 84 Mo. 315; *Nelson v. Ghiselin*, 17 Mo. App. 665; *Murphy v. DeFrance*, 23

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Mo. App. 343; *Fannon v. Plummer*, 30 Mo. App. 28. This power may exist subject to this limitation or qualification, that its exercise by the trial court is subject to review by the appellate court. (2) There is no pretense that the trial court in vacating its judgment and recalling the execution contravened any statute. There is no substantial ground upon which to claim that the trial court acted oppressively in so doing. The section of the statute (R. S., sec. 8924) was intended "as a substitute for the ancient chancery practice in regard to interrogatories appended to a bill. and had the same object in view, which was to give a party an opportunity to sift the conscience of his adversary. *Eck v. Hatcher*, 58 Mo. 239. By failing to obey the order of the subpœna, the party puts himself in contempt of the court; and the punishment authorized by the statute for this contempt, in addition to the usual punishment for contempt, is the striking out of his pleading. The statute does not require the court to strike out the pleading. The court may or may not strike out the pleading, as in its wise discretion it may deem just and expedient. In other words, the court has a discretion to strike out the pleading or not, and also a discretion to rescind, or not rescind, the order striking out the pleading. The exercise of this discretion is not subject to review.

SMITH, P. J.—This was a suit begun by plaintiff against defendant in the circuit court of Buchanan county on a promissory note. The answer pleaded in bar the ten years' statute of limitation. The replication, in avoidance of the bar of the statute pleaded, set forth that the said note was executed and indorsed in this state where the defendant, who was the indorser thereof, was a citizen and resided; that he was then a single man, had no family and was not a housekeeper, boarded at hotels and temporary boarding-houses, and had no place called his usual abode, so that process could not be served upon him otherwise than by serving in person;

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that he continued such life up to the year 1885, and that, between the date when said note became due until 1885, he had at divers times and frequently been absent from this state three and six months at a time, at Washington City, the lakes of the north and other places, so that the ordinary process of the law could not be served upon him, and that such absence prevented the statute from running in his favor, etc. At the January term, 1889, on the sixteenth day thereof, the cause came on for trial, when the defendant failed to appear either in person or by attorney. It appearing to the satisfaction of the court that the plaintiff had previously caused two subpœnas to be issued by the clerk of the court which had been duly served upon defendant to appear as a witness to testify in behalf of the plaintiff, and defendant not appearing in obedience to the command of said writs of subpœna, the plaintiff thereupon asked the court to strike out the defendant's answer, which was by the court ordered accordingly. The court rendered judgment against defendant for want of answer. On the twenty-second day of April, 1889, it being the fifty-sixth day of the said January term, 1889, defendant filed an affidavit to set aside said judgment on the ground that, "owing to pressing business demanding his absence from the city of St. Joseph at the time he was commanded by said writs of subpœna to appear and testify in said cause," and for no other reason he failed to appear in obedience to the writs of subpœna. The affidavit further stated the defense interposed by his answer was good in law and fact, and also negatived the allegations of the replication. At the May term, 1889, defendant asked and obtained leave to file the affidavit of his former attorney in the cause, wherein it was set forth that at the January term, 1889, the said attorney was a senator attending to his duties at Jefferson City; that he had at a prior term of the court agreed with plaintiff's attorney to continue the cause—he had for that reason not notified defendant that he would not

be in court to defend the cause at said term, etc. On June 10, 1889, the circuit court sustained the motion to set aside the judgment. The defendant thereupon refiled his answer. The plaintiff then filed a motion to set aside the order sustaining the defendant's motion to set aside the judgment, which being overruled, the plaintiff declining to further prosecute the cause, the same was by the court dismissed for want of prosecution, and rendered final judgment accordingly. The plaintiff then appealed.

I. Under the practice in chancery, which obtained in this state prior to the adoption of the code, a plaintiff could file a bill of discovery and require the defendant to make full, true and complete answer to such interrogatories material to the cause, as the plaintiff might propound, and, when the defendant had made full, true and complete answers to such interrogatories, the plaintiff could read defendant's answer in evidence in support of the allegations in his bill. 2 Daniels' Ch. Pr. [5 Ed.] 1537; Story, Equity, sec. 1483; *Eck v. Hatcher*, 58 Mo. 235. The code has abolished the distinction in practice between law and equity, and with it the bill of discovery (*Bond v. Worley*, 26 Mo. 253; *Ragan v. McCoy*, 29 Mo. 356), and has substituted in its place sections 4013 to 4016, Revised Statutes, 1879, which provide that any party to a civil action may compel the adverse party to testify as a witness, and if such party, on being duly summoned, refused to attend and testify either in court or before any person authorized to take his deposition, besides being punished himself as for contempt, his petition, answer or reply may be rejected. In this case it is conceded that not only one, but two, subpœnas had been duly served upon the defendant to appear and testify on behalf of the plaintiff at the trial. The defendant's failure to obey the court's writ of subpœna was, *ipso facto*, a contempt of court which fully authorized the exercise of its discretion in rejecting his answer, and

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rendering judgment against him by *nil dicit. Haskell v. Sullivan*, 31 Mo. 435; *Snyder v. Babb*, 40 Mo. 167; R. S., secs. 4012–4016.

The judgment having been properly rendered against defendant, as we think, the remaining and decisive question is, whether the court erred in setting the same aside on defendant's affidavit for that purpose. It will be observed by reference to section 4016, Revised Statutes, *supra*, that the court is there invested with a double and separable power. It may, *first*, punish the defendant "himself as for a contempt;" and, *second*, may, besides, reject his petition, answer or reply. So, that in the case under consideration, the matter of the punishment for the contempt was wholly between the defendant and the court, and with which plaintiff had no concern. But the action of the court in respect to the case concerned the plaintiff as well as the defendant. While in the one instance the defendant by *an ex parte* showing might satisfy the court that no such contempt had been committed as called for the infliction of punishment by fine or imprisonment (Revised Statutes, 1879, sections 1055 to 1056); but, to avoid the consequences of the contempt as to the plaintiff, other considerations must not be overlooked to which we shall presently advert. The defendant contends that the trial court had the discretion to rescind or not rescind the order striking out the defendant's answer, but that when the discretion was exercised it was not the subject of review. No authority is cited, nor is even a plausible reason stated in support of this contention. The power of trial courts, in the absence of statutory limitations, to vacate their own judgments during the term, for good cause existing or shown, is not open to question. *Williams v. Circuit Court*, 5 Mo. 248; *Richmond v. Waidlaw*, 36 Mo. 313; *Sloan v. Forse*, 11 Mo. 85; *Simpson v. Blunt*, 42 Mo. 544; *Randolph v. Sloan*, 58 Mo. 155; *State ex rel. v. Adams*, 48 Mo. 310; *Andrews v. Costican*, 30 Mo. App. 29;

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Murphy v. DeFrance, 23 Mo. App. 337; *Nelson v. Ghiselin*, 17 Mo. App. 663. In the last case cited the rule is stated thus: "When the trial court during the term when the judgment is rendered vacates it, its action in so doing must, in the absence of a showing to the contrary, be considered warranted by the exercise of its general power. Its action, however, is subject to review by the appellate court by *mandamus* or appeal, as the case may be. The party seeking such review must affirmatively show that the action of the trial court in thus vacating its judgment was either illegal, because in contravention of same, or else that it should be set aside because oppressively exercised." It is, therefore, seen that the general power of courts over their judgments, during the term at which they were rendered, is not absolute.

Was the action of the court in setting aside the judgment in this case an abuse of its legal discretion? In the determination of this question is necessarily involved an examination and consideration of the motion upon which the action of the court was based. The defendant as an excuse for his disobedience of the writ of subpœna states in his affidavit, that it was owing "to pressing business demanding his absence from the city of St. Joseph," on the day named in the writs for the trial of said cause. This is but the statement of a legal conclusion. The defendant should have stated the facts, if any there were, so that the court could have determined therefrom whether the same were of such pressing importance as justified his disregard of its writ. If the facts had been stated, the court might or might not have concluded the business of the defendant was so pressing as to justify his disobedience. How could the court tell whether the defendant's conclusion was justified by the existing facts, unless the same had been set forth in his affidavit? *Biebinger v. Taylor*, 64 Mo. 63; *Lamb v. Nelson*, 34 Mo. 501; *Florez v. Uhrig's Adm'r*, 35 Mo. 517. Not a single fact is

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stated which would constitute good cause for the exercise of the power of the court in vacating the judgment. The motion is barren of any fact from which the court could have deduced the conclusion that the defendant was unavoidably prevented from obeying the subpœna, or that he was "anxious and willing to state all the facts in his knowledge relative to the issues in said cause." The statutory rule, section 3586, that it shall be the duty of courts to so construe the provisions of the law relating to pleading, and to so adapt the practice thereunder as to discourage, as far as possible, negligence, deceit and delay, seems to have been lost sight of by the trial court in the vacating of its judgment, and in the subsequent proceedings in this case. The authorities are quite uniform that in all cases of this kind the affidavit should also show merits as well as diligence. *Campbell v. Gaston*, 29 Mo. 345; *Biebinger v. Taylor*, 64 Mo. 63. The defense of the statute of limitations which is referred to in the defendant's affidavit in this case, like that of usury, and the statute of frauds, is not such meritorious defense. Courts are inclined to regard with disfavor these technical defenses. *Elliott v. Leak*, 4 Mo. 542; *Biebinger v. Taylor*, 64 Mo. 63; *People v. Rains*, 23 Cal. 127. Nor is it perceived that the defendant's position is strengthened by the affidavit of his former attorney. It lends not the slightest support to the allegations of the defendant's affidavit. It seems to us the plaintiff has clearly made out a case within the rule laid down in *Nelson v. Ghiselin*, *supra*. The action of the court in setting aside the judgment was without legal cause, and such an abuse of its general power as to warrant our interference. It, therefore, follows that the judgment of the circuit court will be reversed, and cause remanded with directions to that court to reinstate the judgment rendered in the cause on sixteenth day of January, 1889, against defendant for $427.20. GILL, J., concurs.

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Ex Parte JOFFEE, Petitioner.

In Vacation.—At Chambers, July 21, 1891.

1. **Dramshops:** FREEHOLDERS CHARTER OF KANSAS CITY: PROVISIONS OF SELF-EXECUTIVE. The freeholders' charter of Kansas City of 1889 requires that an applicant for a dramshop license to secure the indorsement on his application of the board of police commissioners that he has proved himself a person of good moral character, and, whenever such application so indorsed shall be presented to the city auditor, he shall issue a license to such applicant. Said charter also provides that ordinances, etc., in force at the time this charter takes effect, and not inconsistent with the provisions thereof, shall remain in force, etc. These provisions are self-executive, requiring no provisions of the common council to render them efficacious.

2. ——: ——: DRAMSHOP ORDINANCE OF 1888: REPEAL. The dramshop ordinance of 1888 as it appears in the revised ordinances of that year, being inconsistent with the freeholders' charter, as to the prerequisites of the granting of a dramshop license, is in so far repealed by said charter.

3. ——: ——: BOARD OF POLICE COMMISSIONERS. The freeholders' charter has conferred upon the board of police commissioners full and exclusive power over the subject-matter of the grant and revocation of city dramshop licenses, and the propriety of the issue of such license in any given case is a matter solely within the discretion of the board; and it has likewise, as shown by the history of its adoption, left with the mayor and common council the power to fix the amount of the charge for such license.

4. **Definitions:** "LIKEWISE" IN CHARTER OF KANSAS CITY: CONSTRUCTION. The word "likewise" in section 1 of chapter 111 of the freeholders' charter of Kansas City means "in like manner, also;" and every grant of power which follows the exception in said section is also and *in like manner* as much subject to its operation as all the powers conferred by the words which precede.

5. **Construction:** RULES OF, AS TO REPEALS AND INCONSISTENCY OF FORMER AND LATTER STATUTES. In the opinion the following rules of construction are cited *arguendo* and applied:

    (1) An affirmative enactment of a new rule implies a negative of whatever is not included or is different; and, if by the language used, a thing is limited to be done in a particular form or manner, it includes a negative that it shall not be done otherwise.

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(2) If two statutes can be read together without contradiction or repugnancy or absurdity or unreasonableness, they should be both read together and both have effect.

(3) An intention will not be ascribed to the law-making power to establish conflicting systems upon the same subject, or to have in force provisions of law by which the legislative will may be thwarted and overthrown.

(4) When the mode in which the municipal power of a corporation upon any given subject can be exercised is prescribed by the charter, that mode must be followed.

(5) If two inconsistent acts be passed at different times, the last is to be obeyed, and, if obedience cannot be observed without derogating from the first, it must give way.

(6) Where a statute expresses first a general intent and afterwards an inconsistent particular intent, the latter will be taken as an exception from the former and both will stand.

Original Proceedings by Habeas Corpus.

PETITIONER DISCHARGED.

No briefs filed.

SMITH, P. J.—It appears from the petition, return and accompanying exhibits that the circuit court of Jackson county in a certain proceeding pending before it declared the licenses under which the petitioner was conducting the business of dramshop keeper in a certain block in Kansas City to be void, and adjudged and decreed that he be enjoined "from maintaining or operating a dramshop" until he obtain a valid license from the county court of Jackson county and the auditor of Kansas City. The petitioner subsequently obtained licenses respectively from the county court of Jackson county and the auditor of Kansas City, the former of which is conceded to be valid. Subsequently, upon an information filed charging the petitioner with violating the injunction, the court caused an order of commitment to be entered of record, which amongst other things alleged that the petitioner "under color of a void dramshop license from the auditor of Kansas City issued

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on the first day of June, 1891, did wilfully disobey the order and decree of injunction made by this court on the twenty-third day of May, 1891, by maintaining and operating a dramshop *and by selling*, furnishing and otherwise disposing of, in quantities less than one gallon, wine, beer, brandy, whiskey and other fermented and spirituous liquors * * * when he had not obtained the written consent of a majority of the property-owners within the block or square and fronting on the street where said dramshop was proposed to be opened as required by the 'revised ordinances of 1888 of the City of Kansas, now Kansas City,' before receiving a license from the city auditor of Kansas City, though he had paid the fee therefor required by sections 295 and 296 of said ordinance. For the violation of said order on each day he is so found guilty, the court enforces a fine of $5, amounting in gross to the sum of $10, and the sheriff of the county is ordered to take and seize him, the said George Joffee, etc. The petitioner while in custody of the sheriff under the order of the commitment makes his application to me, one of the judges of the Kansas City Court of Appeals, for his discharge under the writ of *habeas corpus*."

The petitioner's contention is that so much of the ordinances of 1888, set forth in the order of commitment, as requires an applicant for a dramshop license to first obtain the written consent of the majority of the property-owners within the block or square and fronting on the street where the dramshop is proposed to be opened, and also to produce to the city auditor the certificate of the city assessor showing the owners of the property whose consent is required to be obtained, before a dramshop license can issue to him, is repealed and superseded by the provisions of the charter framed by the "board of freeholders," and adopted at the special election in 1889, and that, therefore, the matter alleged in the order of commitment does not in point of law amount to a contempt. This contention presents

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what seems to be the underlying and decisive question which I am called upon to determine. By subdivision 13, section 1, article 3, of the amended charter of the City of Kansas, approved March 24, 1875, power was conferred upon the common council to license, tax and regulate tippling houses and dramshops. In the exercise of the power thus conferred the common council passed the ordinance just referred to. This ordinance as originally passed made no reference to the charge for dramshop licenses. But, in the revised ordinances of the city of 1888, the said ordinance which had been previously passed is found under chapter 14, in relation to the licensing and regulating of dramshops.

This was the state of the ordinances of the city in respect to the licensing and regulating dramshops when the present charter was adopted. The latter declares: "Before an application for license to keep a saloon, beer house, tippling house or dramshop shall be received or filed by the city auditor, there shall be indorsed thereon a certificate signed by the board of police commissioners that such applicant has proved himself to be a person of good moral character. Whenever such application is presented to the board of police commissioners such board shall cause notice in writing to be served by a policeman upon every resident property-owner in the block where such saloon, beer house, tippling house or dramshop is proposed to be located, designating a day, not less than five days nor more than ten days after service of such notice, when remonstrances, if any, against the issuance of such licenses will be heard by such board. Whenever such application so indorsed as aforesaid by said board of police commissioners shall be presented to *the city auditor he shall* issue a license to such applicant." Charter, 1889, sec. 33, art. 17. By the first section of the article just referred to it is further provided: "All ordinances, regulations and resolutions in force at the time this charter takes effect and

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not inconsistent with the provisions thereof shall remain and be in force until altered, modified or repealed by the common council." The article from which these two sections have been quoted embraces forty-four sections which relate to nearly as many diverse and dissimilar subjects. These charter provisions are nearly all self-executive, requiring no action of the common council to render them efficacious. It must follow that, if the ordinances recited in the order of commitment are inconsistent with the provisions of said section 33 of the charter, the former must be held to be displaced and repealed.

The ordinances, to which reference has been made, by the clearest implication prohibit the city auditor from issuing a license before the applicant has obtained the written consent of the majority of the property-holders and has presented the certificate of the city assessor as is therein imperatively required. The charter introduces a radical change—a wide departure, in the mode and manner in which city dramshop licenses were to be applied for and obtained from that which was provided in the pre-existing ordinances. The freeholders' charter invested the board of police commissioners—a body created by the statute of the state—with a power *quasi* judicial in its nature, to require every applicant for a dramshop license to prove himself to be a person of good moral character before he is entitled to receive such license. And when the applicant had made that proof before this tribunal, and its certificate to that effect is indorsed on his application and presented to the city auditor, the mandate of the charter is that *he shall issue a license to such applicant*. But though the applicant be armed with requisite certificate of good character, yet, if he does not meet the requirement of the ordinance in respect to obtaining the consent of the property-owners, the city auditor must deny him a license, notwithstanding the mandate of the charter. The ordinance prohibits the city auditor from

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issuing a license under conditions where the charter requires that he shall issue it. The inconsistency between the charter and the provisions of the ordinance thus becomes quite apparent.

It is well settled that an affirmative enactment of a new rule implies a negative of whatever is not included, or is different; and if by the language used a thing is limited to be done in a particular form or manner it includes a negative that it shall not be done otherwise. Sutherland on Stat. Const., sec. 140; *Wells v. Supervisors*, 102 U. S. 635; *Chandler v. Hann*, 83 Ala. 390. Any regulation prescribing the conditions upon which a dramshop license may issue which requires the applicant therefor to obtain the written consent of the majority of the property-owners in the block where it is proposed to open the dramshop, and in addition thereto that the tribunal controlling the issue of such license gives the property-owners notice to appear and enter their objections, if any they have to the issue of the license, to which they have already consented, would be justly regarded as unreasonable, if not absurd, in its requirements; and yet this is just what is required by the said ordinance and charter, if both are in force. If two statutes can be read together without contradiction, or repugnancy or absurdity or unreasonableness, they should be read together and both will have effect. An intention will not be ascribed to the law-making power to establish conflicting systems upon the same subject, or to leave in force provisions of law by which the legislative will may be thwarted and overthrown.

It is to be further observed that said section 33 of the city charter clothes the board of police commissioners with the power not only to pass upon the moral character of an applicant for a dramshop license, but goes further and invests it with power to cause notice in writing to be served upon every resident property-owner in the block where a dramshop is proposed to be located, designating a day when remonstrances against

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the issuance of such license will be heard by such board. Though the applicant may prove himself to be a person of good moral character, yet, if the property-owners or any of them can show any sufficient cause why a license should not issue, then in such case the board has the clearly implied power to decline making an indorsement of its certificate on the application to the city auditor, and thus to defeat the issuance of the license. It seems to me quite obvious that section 33, article 17, and section 34, article 12, of the city charter has conferred upon the board of police commissioners the full and exclusive power over the subject-matter of the grant and revocation of city dramshop licenses.

The propriety of the issue of a city dramshop license in any given case is under the charter a matter solely within the discretion of the board. When the mode, in which the power of a municipal corporation upon any given subject can be exercised, is a prescribed by the charter, that mode must be followed. *First Presbyterian Church v. City*, 36 Ind. 338; *Moberly v. Wright*, 19 Mo. App. 271; Dillon on Mun. Corp. 328, 316, note 1; *State v. Ferguson*, 33 N. H. 424. Where a statute prescribes an exclusive rule it implies a negative, and repeals whatever of existing law stands in the way of its operation. Sutherland on Stat. Const., sec. 139. Tested by the rules of construction just adverted to, it seems to me that the charter accomplished the repeal of the ordinances recited in the order of commitment. It is quite true that the charter does not meet and cover all the provisions of the dramshop ordinances of 1888. It does not in the least encroach upon the provisions which relate to the charge for the license. This matter was very properly left subject to the control of the common council by ordinance. The board of free-holders submitted to a vote of the people several alternative propositions embraced in separate sections of the charter, among which was section 44, which provided: "Every license for keeping any saloon * * *

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shall be $250," which was defeated. It is thus seen that the people while adopting the section of the charter investing the board of police commissioners with the power of control, in respect to granting and revoking dramshop licenses, declined to take from the mayor and common council the power to fix the amount of the charge for a dramshop license, by defeating the adoption of the alternative section of the charter proposed. Because these provisions in respect to license charges were not encroached upon by the charter as adopted, it by no means follows that the other provisions which are inconsistent with it are unaffected. It is a mistake to suppose that because the charter does not purport to cover the subject covered by the ordinances in question that the former did not repeal the repugnant provisions of the latter. The charter of a city bears the same relation to the ordinances of a city that the constitution of the state bears to its statutes, and the general rule applicable to unconstitutional statutes is, I think, applicable to the case under consideration. If two inconsistent acts be passed at different times, the last is to be obeyed, and, if obedience cannot be observed without derogating from the first, it is the first which must give way. Every act is made either for the purpose of making a change in the law, or for the purpose of better declaring the law, and its operation is not to be impeded by the mere fact that it is inconsistent with some previous enactment. A partial repeal of a statute may be accomplished by a partial repugnancy to another statute—the rule being that the repeal extends only so far as the repugnancy extends and leaves all the remainder in full force. *Quinnette v. St. Louis*, 76 Mo. 402; *County Court v. Griswold*, 58 Mo. 199; *Manker v. Felliber*, 94 Mo. 430; *Dean v. Bliss*, 5 Beav. 582; *VanRensselaer v. Snyder*, 9 Barb. 308; *Harrington v. Trustees*, 10 Wend. 550; *Bowen v. Lease*, 5 Hill (N. Y.) 225; *Williams v. Potter*, 2 Barb. 316.

The provisions of the ordinances fixing the license charge is not so essentially and inseparably connected

in substance with that requiring the applicant for a dramshop license to obtain the written consent of the property-owner that one cannot stand without the other. I think the latter case stands though the former fall. There is no force in the point made in the argument to the effect that "if section 33 of chapter 17 of the charter is construed as I have indicated that then the provisions of section 1, chapter 111, of that instrument, which relate to the powers of the common council to regulate, suppress, license and tax saloons, is void, for the very manifest reason that the last-named section expressly provides that the "mayor and common council shall have the management and control of the finances and other property, real, personal and mixed, belonging to the corporation, *except as is in this charter otherwise provided, and likewise shall have power by ordinance*" to do the several things thereafter in that section specified. It may be further observed in this connection that in order to ascertain what power the mayor and common council possess by ordinance it is necessary to understand the force and effect of the word "likewise," as it appears in that part of section 1 which has just been quoted, for the measure and manner of their power by ordinance is determinable by that word. This word is defined by standard lexicographers to mean "in like manner, also, moreover, too; and, occupying the position and relation it does to the other words of the section, it furnishes an inerrable guide to the true construction of the section in its entirety. It will be seen that all the powers conferred in the section upon the mayor and common council by the words which either precede or follow the word "likewise" are subject to the common exception, that is to say "except as in this charter is otherwise provided." Every grant of power which follows the words of this exception is also and *in like manner* as much subject to its operation as all the powers conferred by the words which precede it. There is no distinction. It is too plain for argument

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that had the alternative section fixing the charge for dramshop licenses hereinbefore referred to been adopted and become a part of the charter that it would have operated as a limitation and restriction on the general power granted by section 1 of chapter 111 to the mayor and common council, to regulate, license and tax saloons by ordinance. This alternative section proposed to withdraw from the general powers of the mayor and common council, enumerated in said section 1, the special power to fix by ordinance the amount of the dramshop license tax. And it is equally clear that the provisions of section 33 of article 17 not only accomplished the repeal of sections 297 and 298 of the revised ordinances of 1888, but also limits and qualifies the operation and effect of the words in section 1 conferring the powers which have just been specified. The former is no more than a limitation upon the latter. The general power to suppress, license and regulate dramshops is limited and excluded to the extent specially provided in said section 33, or, stated in another way, the special power withheld by section 33 is not included in the general grant contained in section 1 of the charter.

The rule of construction applicable here is that where a statute expresses first a general intent, and afterwards an inconsistent particular intent, the latter will be taken as an exception from the former, and both will stand. Sutherland, Stat. Const., sec. 153. It must needs follow that the city licenses received by the petitioner were valid and conferred upon him full authority to sell the intoxicating liquors, which sale was charged and adjudged as constituting a violation of the injunctive order, and that the matter alleged in the order of commitment did not in point of law amount to contempt.

It results from these considerations that the petitioner must be discharged, and it is so ordered.

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CASES DETERMINED

BY THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS,

AT THE

OCTOBER TERM, 1891.

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HESTER MARY BRADLEY, Petitioner, v. J. G. WOERNER, Judge of the Probate Court of the City of St. Louis, Respondent.

St. Louis Court of Appeals, October 20, 1891.

1. **Probate Courts:** TRIAL BY JURY. The provision of the code of civil procedure for the trial of certain issues of fact by jury (R. S. 1889, sec. 2131) has no application to proceedings in the probate court, and in that court there can be no trial by jury in the absence of statutory provision therefor.

2. ——— : ——— : CONTESTED CLAIM FOR WIDOW'S ALLOWANCE. *Held*, accordingly, that, where a claim was made for a widow's allowance in the course of the administration of an estate, and the administrator denied that the claimant was the widow of the decedent, the issue was not triable by jury.

Original Proceeding of Mandamus.

WRIT DENIED.

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V. W. Knapp and *C. M. Napton*, for petitioner.

Douglas & Scudder, for respondent.

BIGGS, J.—The legal question presented for our consideration is raised by the demurrer to the respondent's answer. The petitioner claims to be the widow of Patrick B. Bradley, deceased, and, as such widow, she filed in the probate court of the city of St. Louis, where the administration of the decedent's estate is pending, an application for a widow's allowance. The public administrator, who had the estate in charge, denied that the petitioner was the widow of the deceased. The petitioner demanded that a jury be summoned to try that issue of fact, which the respondent refused to do. Hence, this proceeding by *mandamus* to compel the respondent, as judge of the probate court of the city of St. Louis, to summon a jury for the purpose stated.

The respondent's reasons for his action are, that courts of probate in Missouri have no powers not expressly conferred upon them by statutory enactment, or by necessary implication; and that, as the legislature had not authorized the judges of such courts to take the verdict of a jury in proceedings touching the allowances to widows, there was no warrant or authority which would justify a compliance with the demand of the petitioner.

The limitation on the powers and jurisdiction of probate courts, as claimed by the respondent, must be conceded, and, unless section 2131 of the statutes (R. S. 1889) is applicable to proceedings in the probate courts, the peremptory writ must be denied. The section reads: "An issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial be waived or a reference ordered as hereinafter provided." We are of the opinion that this section is not

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applicatory to probate courts, or other courts of record possessing no common-law jurisdiction. It is embodied in the code of civil procedure, which has always been understood to refer to and govern the practice and proceedings of courts of record possessing common-law jurisdiction. A reference to the probate law itself furnishes the best argument in support of the proposition. R. S. 1889, secs. 74, 75, 76, 77, 200, 201, 202. The first three sections provide for the form of proceedings in the probate court for the discovery of assets alleged to belong to an estate. Section 77 enacts, that the issues made by the interrogatories and answers provided for by the preceding sections must be tried by a jury, if either party demand it. A like requirement is made by sections 201 and 202 in the allowance of all demands against an estate, which are in excess of $20. Now, if section 2131 is applicable to proceedings in the probate courts, sections 77, 201 and 202 are entirely superfluous. Besides, under this construction, section 201, in so far as it limits the right to a trial by a jury, would be repugnant to section 2131, which undertakes to secure to litigants the right of a jury trial in all suits for money, regardless of the amount involved.

The practice act (sec. 2165) provides that the court may award a new trial of any issue of fact upon good cause shown. If the petitioner's position as to section 2131 should be adopted, then it would logically follow that probate courts would have the right to grant new trials. But the supreme court, in the case of *Bartling v. Jamison*, 44 Mo. 141, expressly decided that no such power existed.

Again, the practice act (sec. 2258) provides for a change of venue in civil cases. If this section was intended to cover causes pending in the probate courts, then the enactment of section 3403 in reference to the transfer of causes from the probate courts to the circuit or county courts was unnecessary. In the recent case of *Morris v. Lane*, 44 Mo. App. 1, this court decided

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that section 2258 provided solely for changes of venue in cases pending in the circuit courts, or other courts possessing general or common-law jurisdiction. All that was said in that case is applicable to the present proceeding.

The case of *Hoyt v. Davis*, 21 Mo. App. 235, in no way aids the petitioner. What was said in that case of the right of trial by jury had reference solely to the practice in the circuit court. That was an appeal to this court from the circuit court. It was the action of the circuit court on a trial *de novo*, and not that of the probate court, that was under review.

The peremptory writ will be denied, and judgment for the costs in this proceeding will be entered against the petitioner. All the judges concur.

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FRANK RING, Plaintiff; JOHN H. POHLMAN, Respondent, v. CHARLES VOGEL PAINT & GLASS COMPANY; FRANCIS NOHL, Assignee, Appellants.

St. Louis Court of Appeals, October 27, 1891.

1. **Attorney and Client:** PRESUMPTION. There is a presumption that all steps taken by an attorney in the progress of a suit, such as the taking of an appeal, are taken at the direction of the party for whom he appears. And when the presumption is supplemented by the affidavit of the attorney that he has the authority of such party for the action taken by him, it can only be overcome by very satisfactory evidence to the contrary.

2. **Appeal:** AFFIDAVIT BY AGENT. It is not essential that an affidavit for an appeal to this court, made by a person other than the appellant, should state that the affiant is the agent of the appellant; the omission of such statement is cured when the agency appears *aliunde*.

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3. **Costs.** The entire subject of costs is a matter of statutory enactment, and the statutes regulating it must be strictly construed; accordingly, an officer or other person claiming costs is not entitled thereto, unless he can point to a statute authorizing the taxation of the same.

4. ——— : ATTACHMENT : CLAIMS OF COSTS BY THE SHERIFF. And, *held*, under the rule thus stated, that a sheriff who levies upon property under a writ of attachment, and causes it to be appraised, is not entitled to the taxation of the expense thereof as costs; nor is he entitled to the taxation of $1 as costs for an application to the court for the sale of the property; but he is probably entitled to fifty cents for taking and returning a forthcoming bond; and the taxation of outlays for labor and clerk hire is permissible, provided that it is shown that the expenditure was necessary for the care of the property, and reasonable.

5. ——— : ——— : SHERIFF'S COMMISSIONS. Property was attached, and the attachment debtor subsequently made an assignment for the benefit of creditors. The assignee gave a forthcoming bond, and, the attachment being sustained, paid to the sheriff then in office, who was the successor of the one who had levied the attachment, a sufficient amount to cover the claim of the attaching creditor and costs, including half commissions. *Held*, that the sheriff who levied the attachment was not entitled to these half commissions.

Appeal from the St. Louis City Circuit Court.—Hon. Leroy B. Valliant, Judge.

Reversed and remanded.

Walter M. Hezel, for appellants.

(1) The burden of proof is on the sheriff to show that the costs were properly incurred, and are legally chargeable. *Miller v. Muegge*, 27 Mo. App. 670. (2) The sheriff can only get such fees and charges as are fixed by section 4989, Revised Statutes, 1889, and, where property is seized by attachment, reasonable compensation for his trouble and expenses in keeping the same. *Miller v. Muegge*, *supra*. (3) The statute must be strictly construed. *Shed v. Railroad*, 67 Mo. 687;

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In Matter of Murphy, 22 Mo. App. 476. (4) Where this court has plainly construed the law as to fees of an officer the inferior court must follow, and cannot, out of kindness to its officer, give him compensation or indemnity for moneys paid to protect himself, and which the law does not expressly allow.

Ford Smith, for respondent.

(1) The appeal should be dismissed, for the reason that the motion to retax was filed, and the appeal taken, without authority. *Keith v. Wilson*, 6 Mo. 435. Because the affidavit for appeal was not made, nor does it purport to be made, by appellant or its agent. R. S. 1889, sec. 2248; *Melcher v. Scruggs*, 72 Mo. 406. Also, because Francis Nohl, assignee, in whose name the motion was filed and appeal taken, has been finally discharged as assignee. (2) The motion to retax was properly overruled. The items attacked by it were either expressly allowed by section 4989, Revised Statutes, or were such as the court, out of which the process issued, deemed reasonable. R. S. 1889, secs. 549, 4989; *Gates v. Buck*, 75 Mo. 688.

Biggs, J.—This case reaches us on an appeal from a motion to retax costs.

Before we proceed to the discussion of the questions raised by the motion, we must dispose of some preliminary objections raised by the respondent.

It is said by his counsel that this appeal is without authority, and for this reason he moves a dismissal. In support of this motion he presents his own affidavit, the purport of which is that Nohl, the assignee, told him that the appeal was taken without his (Nohl's) authority. On the other side the counsel for the appellants declares on oath that the appeal was taken by him with the assent of both defendants.

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There is a strong legal presumption that all acts of an attorney in the progress of a suit are done by the direction of the party whom he assumes to represent. A lawyer is an officer of the court, and the presumption of right acting can always be invoked in support of his action in the courts. When this presumption is supported by the affidavit of the attorney himself, a strong case is made, and it can only be overthrown by the production of very satisfactory evidence of want of authority. We are of the opinion that the respondent's evidence in this case is insufficient for that purpose. *Valle v. Picton*, 16 Mo. App. 178; *Keith v. Wilson*, 6 Mo. 439.

Neither do we think that the appeal ought to be dismissed for want of a proper affidavit. Mr. Hezel, a member of the bar, but not at that time the attorney of record for the appellants, made the affidavit, but he failed to state that he was the agent of the appellants. This is not a fatal omission, but it is cured when the agency appears *aliunde*. *Melcher v. Scruggs*, 72 Mo. 406; *Kearney v. Railroad*, 15 Mo. App. 576. The agency in this case *was* proven by the affidavit of Mr. Haeussler.

Preliminary to the discussion of the items of cost here in controversy, it may be stated that the entire subject of costs, in both civil and criminal cases, is a matter of statutory enactment; that all such statutes must be strictly construed, and that the officer or other persons claiming costs, which are contested, must be able to put his finger on the statute authorizing their taxation. *Miller v. Muegge*, 27 Mo. App. 670; *Shed v. Railroad*, 67 Mo. 687; *Gordons v. Maupin*, 10 Mo. 352; *Ford v. Railroad*, 29 Mo. App. 616.

It appears that the plaintiff brought an action in the circuit court of the city of St. Louis by attachment against the Charles Vogel Paint & Glass Company, and that the defendant Pohlman, the then sheriff of the city

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of Louis, seized, under the writ of attachment, six hundred and two boxes of assorted window glass, fifty-four barrels of oxide of zinc, and sixty-five barrels of pine tar. Pohlman summoned three persons to appraise the goods, and he asked that the amount paid by him for the appraisement, to-wit, $45, and the additional sum of $3 for summoning the appraisers, be taxed as costs in his favor. The circuit court held that he was entitled to the amounts claimed.

We can find no statute authorizing the appraisement of goods seized under a writ of attachment. We can very well see that in many cases the value of goods seized may be a matter of very great importance to the sheriff. If the levy is insufficient, when it might have been extended to other goods belonging to the defendant in the execution or attachment, the sheriff would be liable to an action by the plaintiff. And, on the other hand, if the levy should be excessive, he might be sued by the owner of the goods for an excessive levy. But this does not authorize the sheriff to procure satisfactory evidence for his own protection, at the expense of the litigants. A sheriff must decide for himself the extent and sufficiency of a seizure. This is one of the responsibilities attached to his office. *Fitzgerald v. Blake*, 42 Barb. 513. The statement, that the appraisement was made at the request of the attorney for the defendants, is not borne out by the record. We, therefore, decide that the circuit court erred in allowing these two items of costs.

The court allowed the respondent, as part of his costs, $15 for labor and clerk hire. The statute (R. S. 1889, sec. 549) provides that the court shall allow the officer having charge of property seized under an attachment reasonable compensation for his trouble and expenses in keeping the same. But, under the authority of *Miller v. Muegge*, *supra*, the officer must satisfy the court by evidence that the expenditure

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was justifiable and reasonable. The only proof concerning this item was, that the sheriff had paid the money. If, on a retrial, the respondent satisfies the court by evidence that the expenditure was necessary, and the amount paid reasonable, then the charge should be allowed; otherwise, it should be rejected.

The court allowed the respondent one-half commissions on the amount realized from the sale of the goods. This item is also challenged. Under the peculiar facts, a novel question is presented. The day on which the goods were attached, the defendant corporation made a general assignment for the benefit of its creditors. The assignee was let in to defend the suit, and he gave a forth-coming bond for the property. The property was afterwards sold by the assignee under an order of court, with instructions to hold the proceeds until the attachment suit was determined. This action was decided in the plaintiff's favor, and the assignee was ordered by the court to pay to the respondent's successor in office the amount of plaintiff's judgment, and a sufficient amount to cover costs, in which were included half commissions for the respondent. This charge must be sustained, if at all, under the following clause of section 4989 of the statutes in reference to the commissions of sheriffs. The clause reads: "For commissions for receiving and paying moneys on execution or other process, where lands or goods have been levied on, advertised and sold, three per cent. on $500, and two per cent. on all sums above $500, and half of these sums when the money is paid to the sheriff without a levy, or where the lands or goods levied on shall not be sold, and the money is paid to the sheriff or person entitled thereto, his agent or attorney." A proper construction of this clause does not authorize this item of costs. The commissions (if any) would go to the respondent's successor who collected and disbursed the money. If the respondent is entitled to any compensation, it

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must be allowed him by the court under section 549 (R. S. 1889), which reads: "When property is seized on attachment, the court may allow to the officer having charge thereof such compensation for his trouble and expenses in keeping the same as shall be reasonable and just."

The item of fifty cents for taking and returning the forth-coming bond is probably authorized by section 4989 of the statute, but we can find no authority for the fee of $1 for making application for an order to sell the property. Therefore, it should have been disallowed.

With the concurrence of the other judges, the judgment of the circuit court will be reversed, and the cause remanded for further trial in accordance with this opinion. It is so ordered.

ANTON SCHMITZ, Respondent, v. THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Appellant.

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46	380
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46	380
76	55
f79	464

St. Louis Court of Appeals, October 27, 1891.

1. **Railroads:** NEGLIGENCE. A railway company, whose tracks cross a public highway, and whose cars stand disconnected upon the highway, with a space between them sufficiently large to permit persons to pass through it, is guilty of negligence, if it closes this space suddenly and without warning to the traveling public; and, in the case of such negligence, it is liable for the injury thereby caused to a person, who, without contributory negligence on his part, climbs over the drawhead of a car instead of passing through the open space.

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2. ——— : ——— : CONTRIBUTORY NEGLIGENCE. The person thus injured, who was a boy only nine years old, testified that he climbed over the drawhead instead of passing through the open space, because he would get mashed if he passed between the cars. *Held,* that this remark did not conclusively show that he appreciated the danger of his act, because his testimony, taken as a whole, rendered the inference permissible that this remark was made in the light of subsequent events, and not because he anticipated what happened.

3. **Physical Injury to Child**: FATHER'S MEASURE OF DAMAGES FOR NURSING OF CHILD. If a child suffers physical injury through the negligence of a railway company, its father is entitled to recover, as part of his damages, reasonable compensation for the services of both his wife and himself in nursing the child.

4. **Practice, Trial**: STIPULATION: DEPOSITIONS. A stipulation filed in this cause was to the effect, that a deposition taken in another action might be read in this cause with the same force and effect as if taken upon proper notice. *Held,* that this stipulation waived no right of either party in reference to the deposition, except the right of objection for want of notice, and did not entitle either party to read the deposition against the objection of the other party, if the witness was present at the trial.

5. **Physical Injury to Child**: FATHER'S RIGHT OF RECOVERY FOR SERVICES OF CHILD: SUFFICIENCY OF EVIDENCE. The right of a father to recover for the value of the services of his child, when such child is injured through the negligence of a third person, is predicated upon the relation of master and servant; hence, it is necessary in such case to allege and prove the existence of that relation. But that relation is established by proof that the child was only nine years old; that he lived with his parents at the time of and since the injury; and that he was taken to his home when he was injured, and was nursed by his parents for several months thereafter.

6. **Instructions**: ASSUMPTION OF FACTS. The assumption, in an instruction, of facts put in issue by the pleadings is *held* not to require a reversal of the judgment in this cause, since the evidence thereof was very clear and not controverted; but the practice of assuming in instructions facts which are denied by the pleadings is not approved by this court.

7. **Practice, Trial**: REMITTITUR OF DAMAGES. Where the damages are capable of being definitely determined by an exact money standard, a *remittitur* is permissible for the purpose of obviating an excessive assessment of the same by the verdict of the jury.

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8. **Injury to Minor Child:** MEASURE OF PARENT'S DAMAGES FOR LOSS OF SERVICES. In assessing the damages of a father for the loss of the services of his minor child, when the child has been injured, but not killed, through the negligence of the defendant in the action, no deduction should be made for the cost of the support of the child subsequent to the injury.

9. ——— : DAMAGES OF PARENT FOR LOSS OF SERVICES: BURDEN OF PROOF. If a child, thus injured, is still capable of performing some kind of work, then the father, in suing for the loss of the services of the child, must establish by evidence the probable earning capacity of the child in its injured condition in order to make out a case.

10. **Practice, Trial:** EXCESSIVE VERDICT. If a verdict is excessive under the instructions given by the court, the objection thereto on that ground will not be overcome by the fact that the instructions were erroneous, and that the verdict is not excessive under a correct rule as to the measure of damages.

11. **Jurisdiction, Appellate:** REMITTITUR OF DAMAGES. *Quære*, whether a *remittitur* of damages by the voluntary action of the successful party is permissible, when the effect of it is to change the jurisdiction of an appeal in the cause from the supreme court to this court.

Appeal from the St. Louis City Circuit Court.—HON. JAMES E. WITHROW, Judge.

REVERSED AND REMANDED.

H. S. Priest and *H. G. Herbel*, for appellant.

(1) The court erred in admitting evidence of the nursing of plaintiff's son by plaintiff and his wife, and of the value of such services, and in permitting plaintiff's son to denude and exhibit his foot to the jury. *Dunn v. Railroad*, 21 Mo. App. 203; *Matthews v. Railroad*, 26 Mo. App. 89. (2) The court erred in excluding the deposition of Frank Furley, offered by the defendant, which had been taken at plaintiff's instance on due notice given to defendant. *Schmick v. Noel*, 64

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Tex. 406. (3) The court erred in overruling defendant's demurrer to the evidence interposed at the close of plaintiff's evidence, and at the close of the whole case. *Railroad v. Plaskett*, 26 Pac. Rep. 401; *Corcoran v. Railroad*, 16 S. W. Rep. 411; *Stillson v. Railroad*, 67 Mo. 67; *Dahlstrom v. Railroad*, 96 Mo. 102; *Andrews v. Railroad*, 45 Am. & Eng. R. R. Cases, 171; *Bird v. Railroad*, 48 N. W. Rep. 691; *Lewis v. Railroad*, 38 Md. 588; *Railroad v. Pinchin*, 31 Am. & Eng. R. R. Cases, 592; *Rogers v. Lees*, 21 Atl. Rep. 399; *Sherman v. Railroad*, 72 Mo. 66; *Waldheier v. Railroad*, 71 Mo.; *Gurley v. Railroad*, 93 Mo. 450; *Kendrick v. Railroad*, 81 Mo. 523; *Dlauhi v. Railroad*, 16 S. W. Rep. 281. (4) The court erred in refusing legal instructions asked by defendant. *Rafferty v. Railroad*, 91 Mo. 36. (5) The court erred in giving the instructions of its own motion. *Dunn v. Railroad*, *supra; Matthews v. Railroad*, *supra; Dulaney v. Sugar Co.*, 42 Mo. App. 622; *Mateer v. Railroad*, 16 S. W. Rep. 839; *Gessley v. Railroad*, 26 Mo. App. 160; *Gurley v. Railroad*, *supra; Zimmerman v. Railroad*, 71 Mo. 491; *Turner v. Railroad*, 76 Mo. 262; *Spooner v. Railroad*, 23 Mo. App. 410; *Stoher v. Railroad*, 92 Mo. 518; *Railroad v. State*, 41 Md. 272; *Hudson v. Railroad*, 101 Mo. 18. The court erred in permitting plaintiff to enter a *remittitur*. *Matthews v. Railroad*, *supra; Gurley v. Railroad*, 16 S. W. Rep. 11; *Railroad v. Montgomery*, 16 Pac. Rep. 405. The verdict was excessive, and should have been set aside.

Seneca N. Taylor, for respondent.

(1) The wrongful act of defendant necessitated the nursing of the boy by plaintiff and his family; therefore, he is entitled to recover the reasonable value of such nursing. *Smith v. St. Joseph*, 55 Mo. 459; *Mauerman v. Railroad*, 41 Mo. App. 349; *Murray v.*

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Railroad, 101 Mo. 240; *Frick v. Railroad*, 75 Mo. 542; *Lang v. Railroad*, 51 Hun (N. Y.) 603; *Connel v. Putnam*, 58 N. H. 534; Wood on Master & Servants, 227; 2 Sedgwick on Damages [8 Ed.] 468. (2) The court properly excluded the copy of the deposition of Frank Furley, for he was in court at the time the same was offered, ready to be examined. R. S., sec. 4462. The stipulation states that his deposition filed at Warrenton may be read by either plaintiff or defendant with the same force and effect as if taken on proper notice, and the party reading such deposition shall make him his own witness. Under this stipulation, as the witness was in court, neither could lawfully read the deposition, much less a copy of it. (3) The court did not err in overruling defendant's demurrers to the evidence. On the case made by the evidence, according to the great weight of authority, both in this country and Great Britain, it was properly submitted to the jury. *Hilz v. Railroad*, 101 Mo. 53; *Wilkins v. Railroad*, 101 Mo. 93; *Gurley v. Railroad*, 16 S. W. Rep. 11; *Grant v. Railroad*, 2 MacArthur, 277; *Ranch v. Lloyd*, 31 Pa. St. 358; *Fitzpatrick v. Railroad*, 35 Md. 32; *McMahon v. Railroad*, 39 Md. 348; Shear. & Redf. on Neg. [4 Ed.] secs. 92, 479; *Baum v. Fryrear*, 85 Mo. 151; *Karle v. Railroad*, 55 Mo. 484; *Werner v. Railroad*, 81 Mo. 368; *Petty v. Railroad*, 88 Mo. 306; *Keim v. Railroad*, 90 Mo. 321-2; *Huckshold v. Railroad*, 90 Mo. 555; *O'Connor v. Railroad*, 94 Mo. 150; *Dunkman v. Railroad*, 95 Mo. 241-4; *Kelly v. Railroad*, 95 Mo. 284-6; *Sullivan v. Railroad*, 97 Mo. 118; *Railroad v. Stumps*, 69 Ill. 409; *Railroad v. Shearer*, 58 Ala. 672; *Robinson v. Railroad*, 48 Cal. 409; *Kellogg v. Railroad*, 26 Wis. 223; *Cornell v. Railroad*, 38 Iowa, 120; *Kanowinski v. Railroad*, 24 N. W. Rep. 801; *Humphreys v. Armstrong*, 56 Pa. St. 204; *Filler v. Railroad*, 49 N. Y. 47; *Foly v. Railroad*, 18 C. B. (N. S.) 225; *Clayards v. Dethick*, 12 Q. B. 495. Moreover, defendant, by offering evidence after its demurrer was overruled,

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thereby waived it, and it cannot now insist that the court erred, even if in fact it did, which I deny. *Bowen v. Railroad*, 95 Mo. 275; *Kelly v. Railroad*, 95 Mo. 279; *McPherson v. Railroad*, 97 Mo. 253. (4) Passing through the gap between the cars in a public street, under the circumstances shown in this case, was not negligence *per se*. *Wilkins v. Railroad*, 101 Mo. 93; *Grant v. Railroad*, 2 MacArthur, 277; *Ranch v. Lloyd*, 31 Pa. St. 358; *Fitzpatrick v. Railroad*, 35 Md. 32; *McMahon v. Railroad*, 39 Md. 438; Shear. & Redf. on Neg. [4 Ed.] secs. 92, 479. Where a boy uses the care reasonably to be expected from one of his years and capacity, he is not guilty of contributory negligence, and whether or not he did use such care, is a question for the jury. *Kempinger v. Railroad*, 3 Mo. App. 581; *Boland v. Railroad*, 36 Mo. 484; *O'Flaherty v. Railroad*, 45 Mo. 71; *Koons v. Railroad*, 65 Mo. 592; *Sherman v. Railroad*, 72 Mo. 62; *Donoho v. Iron Works*, 75 Mo. 401; *Fink v. Railroad*, 82 Mo. 277; *Saare v. Railroad*, 20 Mo. App. 336; *Drain v. Railroad*, 86 Mo. 574; *McCarthy v. Railroad*, 92 Mo. 536; *Hudson v. Railroad*, 101 Mo. 13; *Williams v. Railroad*, 96 Mo. 275, 290; *Railroad v. Gladman*, 15 Wall. 401; *Railroad v. Stout*, 17 Wall. 657; *Railroad v. Fitzsimmons*, 22 Kan. 686; *Hydraulic Co. v. Orr*, 83 Pa. St. 322. (5) The court did not give improper or illegal instructions at the instance of the plaintiff. The instructions given for plaintiff are in substance the same as those given in *Wilkins v. Railroad*, 101 Mo. 93, and approved by the court. The doctrine announced in the following cases also supports said instructions: *Frick v. Railroad*, 75 Mo. 542; s. c., 5 Mo. App. 439; *Frick v. Railroad*, 75 Mo. 595–609; *Yarnall v. Railroad*, 75 Mo. 585; *Brown v. Railroad*, 50 Mo. 461; *Hicks v. Railroad*, 64 Mo. 439; *Kempinger v. Railroad*, 3 Mo. App. 581; *Railroad v. Stout*, 17 Wall. 657; *Koons v. Railroad*, 65 Mo. 592. See also authorities under points 3 and 4. (6) The

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court properly allowed plaintiff to enter a *remittitur* before judgment was entered. *Thompson v. Butler*, 95 U. S. 694; *Ins. Co. v. Martin*, 95 U. S. 697; *Railroad v. Trook*, 100 U. S. 112; *Milling Co. v. Walsh*, 24 Mo. App. 97; *Sherman v. Printing Co.*, 29 Mo. App. 31; *Ray v. Thompson*, 26 Mo. App. 431; *Keen v. Schnedler*, 92 Mo. 516; *Frick v. Railroad*, 75 Mo. 542. (7) The verdict was not excessive. It indicated cool and calm decision upon the part of the special jury that tried the cause. After the *remittitur* of $150 of the $837.50 for medical and surgical attendance and for medicines and appliances, the other amounts were less than the undisputed evidence showed plaintiff entitled to recover. *Grogan v. Foundry Co.*, 87 Mo. 326; *Parsons v. Railroad*, 94 Mo. 296; *Mauerman v. Railroad*, 41 Mo. App. 348; *Frick v. Railroad*, 75 Mo. 542; s. c., 5 Mo. App. 435.

Biggs, J.—Lesperance street in the city of St. Louis is crossed at right angles by several of the defendant's railroad tracks. The plaintiff's minor son was injured at this crossing. He attempted to pass through a small aperture, which had been left between two of defendant's cars, by climbing over the drawhead of one of the cars. While his foot was on the drawhead, the aperture was closed by a sudden movement of the cars, and the boy's foot was caught and crushed. The plaintiff seeks in this action to recover the amount paid by him for medicine and medical attendance for his son; also compensation for nursing him, and the value of the boy's services during his minority. The defense was that the defendant was not guilty of any negligence, and that the boy was guilty of contributory negligence in attempting to pass, in the manner in which he did, between the cars. Hence, it is claimed by the defendant that the trial court committed error in refusing to sustain a demurrer to the plaintiff's evidence, and that it was additional error to refuse, as the court did, to

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instruct the jury, as a matter of law, that, under the undisputed facts, the boy was guilty of contributory negligence.

There was a trial by the jury, which resulted in a verdict for plaintiff in the sum of $837.50 for medical attendance and for medicine and appliances; $277 for the nursing of the child by the plaintiff and his wife, and $1,496 for loss of services, making a total of $2,610.50. The plaintiff voluntarily remitted $150 from the item for medical attendance, etc., and thereupon the court entered a judgment on the verdict for the remainder. The defendant appealed.

I. In order to maintain this action, it must be shown that the injury received by the boy was occasioned by a failure on the part of the defendant to properly discharge some legal duty it owed to him. On that point the question of the age of the boy can cut no figure. In a case like this it can make no difference, whether the injured party was an infant or adult. The fact that the plaintiff's son was of tender years is only material on the question of contributory negligence, and the question of contributory negligence can only become material, if it is affirmatively determined that there is some evidence tending to prove that the defendant was guilty of negligence, which occasioned the injury. There are cases decided by our own courts, and those of other states, known as "turn-table" cases, in which a different rule of conduct for the protection of children is laid down. But those decisions are based on the idea of attractive danger.

The plaintiff's evidence, upon which the alleged negligence of the defendant is sought to be established, may be briefly stated as follows: The plaintiff's son, in company with three or four companions, was going east on Lesperance street. When they reached the railroad tracks, they found the street blockaded with the defendant's cars, which were standing in the middle of the street. The boys stopped at the crossing for a time

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variously stated from five to fifteen minutes, and looked and listened; they heard no movement of trains or locomotives and did not see any of the railroad men. Thereupon two of the boys passed through the aperture, and then the plaintiff's son undertook to make the passage by climbing over the drawhead, as one of the boys had done who preceded him. While he was in the act of climbing over, the aperture was closed suddenly, and without any warning whatever. The boy's foot was caught between the drawheads, and badly crushed. There was also evidence tending to prove that the cars were jammed together by moving cars. The trainmen were making up a train at the time.

We are of the opinion that the defendant was guilty of negligence, if, without any warning, it closed up the space between the cars. It owed the traveling public the duty to give some warning of an intention to do so; or, if the aperture was closed inadvertently by the act of the trainmen in making up the train, it must nevertheless be held to be negligence. It was the duty of the defendant's servants to know the condition of the cars at the crossing, and to provide against an accidental movement.

The traveler has equal rights with the railroad company to the use of the highway, and, when the facts are as in this case, the plaintiff's son might well assume that, if any immediate movement was made at all, the cars would be pulled further apart, so as to relieve the street of all obstruction; or that, if the company intended a contrary movement, it would, as it ought to do, give some reasonable notice or warning of such intention. If the train had been connected, then we apprehend that the defendant would have been under no obligation to give any notice of such movement, because the trainmen under such circumstances would have had no reason to anticipate that persons on the highway were in a situation of danger as to the train.

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We think that our conclusion is in accord with the recent adjudications of the supreme court. In the case of Wilkins against this defendant, 101 Mo. 93, it appears that the plaintiff's husband was killed at the same crossing. The deceased undertook to pass between two cars standing about two feet apart, and by a sudden backward movement of the train, made without any warning, he was caught and crushed between the cars. The supreme court speaking through Judge BARCLAY said: "This movement is said to have been made with the object of pushing the loose train of seven cars close together towards the north; but, as it was evident that an opening for the purpose of clearing the street was to have been made, a forward movement of the engine and train of eleven cars was much more likely to be anticipated by a looker-on, than the movement that was actually made. There was evidence that no bell was rung or whistle sounded before the movement of the train in question. *Deceased might rightly assume that some such signal would be given before the movement was made.*"

In the case of *Gurley v. Railroad*, 16 S. W. Rep. 11, the plaintiff was passing over a footway leading through the defendant's yards and over its tracks. It was not a public street or highway, but the railroad company had permitted persons to use it in passing to and from the depot. Across this footpath, there was a small space about one foot in width between two cars. The plaintiff undertook to pass through the opening, and by a sudden movement he was caught between the cars and injured. The supreme court held that no negligence could be imputed to the railroad company, because it was under no legal obligation to notify the plaintiff of the movement of its cars at that point. The decision was predicated on the fact, that the footpath was not a public highway, and that the plaintiff's use of it was merely that of a licensee.

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The following extract from the opinion clearly indicates the mind of the court on the question now under discussion. The court said: "The relation of plaintiff and defendant must be kept in view. This was not a public crossing. If it had been so, defendant would have owed plaintiff a positive legal duty; but, being a mere private crossing, and plaintiff being a *licensee only*, defendant was bound not to recklessly injure plaintiff."

In the case of *Stillson v. Railroad*, 67 Mo. 671, the plaintiff undertook to pass through a small opening between two trains, and was injured by the trains coming together. The opening was not at a public crossing, and for this reason the court held that the managers of the train had no right to anticipate that this small aperture would invite pedestrians to cross through, and that consequently the company was guilty of no negligence in failing to give warning of the movement of the train at that particular place.

The fact that the plaintiff's son undertook to climb over the drawheads instead of passing between them, as he might easily have done, does not in our opinion change the legal aspect of the case.

II. We now come to the question of contributory negligence. The court told the jury in its instructions that it was an act of gross carelessness to climb between the cars as the plaintiff's son did. Whether the facts in the case authorized this direction, it is not necessary for us to decide. But the court instructed the jury further in this connection that, if the evidence showed that the plaintiff's son was of sufficient years and understanding to appreciate the danger of so doing, then the plaintiff could not recover. The boy was nine years old at the time he was hurt. The defendant's counsel concede that the general rule is, that the contributory negligence of a child is a question of fact for the jury and not of law for the court. But they contend that the testimony of the plaintiff's son shows

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conclusively that he was impressed with the same sense of danger that an adult would have been under similar circumstances. The boy was probably familiar with trains, and had knowledge of the danger attending their operation, but it does not necessarily follow that he fully appreciated the danger. The familiarity with the operation of trains might have had a tendency to take away the fear which he would naturally have possessed, had he not been accustomed to them. This condition of mind in a boy results from a lack of discretion and an over-confidence in his own ability to take care of himself when he is brought in contact with a familiar danger. It is true that the boy said that he climbed over, because he would get mashed if he passed between the drawheads. But when all of his testimony is read, it is an inference fairly permissible, that this remark was made in the light of subsequent events, and not that he anticipated anything of the kind at the time. We conclude that, on the evidence, the plaintiff was entitled to have the case go to the jury.

III. The boy was nursed by his mother and father. On the question of damages the court instructed the jury that, if they found for the plaintiff they should assess as part of his damages, reasonable compensation for his and his wife's services in nursing the child. The objection made to the instruction is that it authorized a recovery on the part of the plaintiff both as parent and master, whereas the rights arising from these two relations are different and to some extent incongruous. The answer to this is that the supreme court in *Smith v. City of St. Joseph*, 55 Mo. 456, and *Blair v. Railroad*, 89 Mo. 334, where the plaintiffs sued to recover damages both as husband and master for injuries caused to their wives, approved similar instructions, and such decisions must control our ruling.

IV. The defendant offered to read in evidence the deposition of a witness. The court refused to allow the deposition to be read, for the reason that the witness

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was present in court. There was a written agreement between counsel, which, the defendant claimed, gave it the right to have the deposition read, notwithstanding the presence of the witness. The deposition was taken in the case of the injured boy against this defendant, which case was then pending in the Warren circuit court on a change of venue. The witness lived in the city of St. Louis. The legal effect of the agreement was, that the deposition might be read in the present action with the same force and effect, as if it had been taken upon proper notice. By this agreement no legal right in reference to the deposition was waived by either party, except the right of objection for want of notice. It has always been the law of this state that the deposition of one, not a party to the record, is inadmissible when the witness is present in court.

V. It is insisted that the recovery for the loss of services cannot be maintained, for the reason that there was no proof that the plaintiff was entitled to the services of his minor child. It is well settled that such a right of recovery is not predicated on the relation of parent and child, but on that of master and servant. Hence, it is necessary for a plaintiff in such a case to allege and prove the relation of master and servant. In the present case the uncontradicted evidence showed that the boy was only nine years old; that he lived with his parents at the time of and since the accident; and that he was taken to his home at the time he was hurt, and was there nursed for several months by his parents. We think that these facts were sufficient to show that the boy had not been emancipated, and that his father was entitled to his services. Wood on Master & Servant, sec. 228; 2 Greenleaf on Ev., sec. 576.

But it is urged that the court committed error in its instructions by assuming this fact. The general rule is that the trial court must not assume, in its instructions to the jury, the existence of any controverted fact. *Bank v. Crandall*, 87 Mo. 208; *Maxwell*

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v. Railroad, 85 Mo. 95; *State v. Hecox*, 83 Mo. 531; *Comer v. Taylor*, 82 Mo. 347. The supreme court has, in a few instances, departed from this rule, or rather declined to reverse judgments on account of its violation. In the case of *Caldwell v. Stephens*, 57 Mo. 589, the trial court assumed in its instruction that Mrs. Brown was the daughter of one Sheckells. The evidence of this fact was very clear, and there was no proof to the contrary. "Under these circumstances," said the court, "we might not reverse the judgment for that error alone." To the same effect is *Fields v. Railroad*, 80 Mo. 203, and *Carroll v. Railroad*, 88 Mo. 239. Under the authority of these cases we do not think that this court would be justified in reversing the judgment in the present case on account of the error complained of. The evidence was uncontradicted that the boy was the plaintiff's minor son; that he lived with his parents both before and after he was hurt, and that he was nursed by them for several months. We find no countervailing proof or any intimation in the record, save a formal denial in the answer, that these facts were not true. We do not wish to be understood as approving such a practice, but we merely decline to disturb the judgment on account of it.

VI. The defendant also complains of the action of the court in permitting the plaintiff to remit the sum of $150 from the finding of the jury for medical attendance and medicine. And it also claims that the verdict as to other items of damage is excessive under the plaintiff's own evidence, and that the findings of the jury were the result of passion or prejudice. It is urged that under the recent case of *Gurley v. Railroad*, *supra*, the *remittitur* was not permissible. We think that the law of that case can only be applied, where the *remittitur* affects damages which are incapable of being definitely fixed by an exact money standard, as in a case of a recovery for personal injuries. Here the damage, from which the *remittitur* was had, was capable of definite

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proof. The trouble is that the *remittitur* was not large enough. The recovery was for $837.50, and the evidence showed that the surgeon's bill was $600, and the amount paid by the plaintiff for medicines was only $50. Judgment was entered after the *remittitur* for $687.50, which was for $37.50 too much under any view of the evidence. It is true that the surgeon testified that the boy would require further medical treatment, but its probable value was not stated.

The recovery for the loss of services was $1,496, which amount defendant insists was excessive. The court instructed the jurors that in estimating the value of such services they should consider "*the earning capacity of the boy in his injured condition*," and also the possibility of his death during his minority, and from the amount thus ascertained the probable cost for his support should be deducted.

This instruction, under the facts of the case, was erroneous in that it directed the jury, in estimating the value of the services, to deduct from the gross amount of the probable earnings of the boy during his minority *the reasonable cost of his support*, and that the difference, less the amount which he probably could have earned in his injured condition, would represent the sum for which the plaintiff was entitled to a judgment on this item of damage. If the boy had been killed, then it would have been proper to direct that the cost of support be deducted from the gross earnings, because the plaintiff would then have been relieved of such support, and his actual damage could not have exceeded the probable gross earnings less the probable cost of support. But this cannot be the rule, where the child is only injured. In such a case, actual compensation to the parents is the probable value of the gross earnings of the child, less his earning capacity in his injured condition. In cases where the injury is of such a serious character as to render the child incapable of performing *any* labor, then the application of the rule is

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very plain. When the injury is slight, or not of so serious a nature as to take away all capacity for work, the rule can be justly applied by ascertaining the amount which the child would probably earn in its crippled condition, and deducting this amount from its probable gross earnings, had it not been injured, and the difference would represent actual compensation to the parent, which is all the law contemplates in actions of simple negligence. What we have said is supported by the case of *Mauerman v. Railroad*, 41 Mo. App. 348, but the contrary rule received the approbation of this court in *Matthews v. Railroad*, 26 Mo. App. 75. There is an irreconcilable conflict between the two cases; but we think that our ruling in the former case is the true one, and that the *Matthews case* should be overruled on this point.

The misdirection of the jury on the question of damages, which we have discussed, is one of which the defendant cannot complain; but in another respect the instruction was erroneous, and in that we think the defendant was prejudiced. The court told the jury that, in estimating the value of the services, they should "*consider the earning capacity of the boy in his injured condition.*" That portion of the instruction correctly stated the law in the abstract, but the difficulty is that the plaintiff introduced no evidence on that point. Both the attending physician and plaintiff testified that the boy was able to perform any kind of sedentary labor which did not require too much walking or standing. But we can find no evidence of the probable value of such labor. How could the jury consider the earning capacity of the boy in his injured condition, in the absence of any testimony fixing or approximating its probable value? It was incumbent on the plaintiff to introduce some substantial evidence on that subject in order to make out a case. *Duke v. Railroad*, 99 Mo. 347. We cannot agree with his contention, that it was permissible to allow the

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jurors to determine this question on their own individual judgments. If plaintiff is right, then all his evidence, touching the probable earnings of the boy, had he not been injured, was immaterial, because this question, with equal propriety, might have been left to the jury without evidence. Where a matter of damage can be established with any degree of accuracy, the jurors ought not to be turned loose with a roving commission to decide such questions according to their own ideas of right.

The defendant insists that the verdict of the jury on the question of damages was manifestly the result of passion or prejudice, and that their misconduct in this respect was so palpably wrong that it ought to discredit the finding on the main issues in the case. We are inclined to this view. Let us look into the evidence. As we have shown, the verdict for medical allowance and medicine was for $187.50 too much. The finding as to the value of the boy's services was $1,496. The plaintiff alone testified concerning this item. The highest estimate made by him was $3,036. In this estimate no allowance is made for loss of time or the possibility of the boy's death. The maintenance of the boy is placed by the father at $1,722. On this basis, the difference between the earnings and the maintenance is $1,314, whereas the finding was for $1,496. We then have an excess of $182 without any credit for the present earning capacity of the boy; without any consideration of the chances of death; and without any deduction for loss of time. The jurors were excusable for failing to take into consideration the earning capacity of the boy, because there was no evidence on that subject for their guidance. But their action in fixing the damage without making any allowance for sickness, or loss of time from other causes, or for the possibility of death during the time, is inexcusable, and cannot very well be accounted for, except as the result of passion or prejudice. It can make no difference that the direction of

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the court to deduct the cost of maintenance was wrong. The jurors were in duty bound to obey the instruction; but their verdict shows that they paid no attention to it.

There are other matters discussed in the briefs, to which it is not necessary to allude, as they were mere accidents of the trial, and will not likely occur again.

There is another question which we have not noticed, but which may be of importance on a retrial. The effect of the *remittitur* was to bring this case within the appellate jurisdiction of this court. We doubt whether this can be legally done by the voluntary action of the plaintiff.

The judgment of the circuit court will be reversed, and the cause remanded. Judge ROMBAUER concurs; Judge THOMPSON is absent.

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MARY BRUNS, Respondent, v. ELLEN CAPSTICK AND SAMUEL CAPSTICK, her Husband, Appellants.

St. Louis Court of Appeals, October 27, 1891.

1. **Practice, Trial:** OBJECTIONS TO EVIDENCE. Objections to the admissibility of evidence are waived, unless they are made at the time of the offer of the evidence; but the right to object to evidence, on the ground that it fails to substantiate the plaintiff's claim in a material respect, is not lost by the failure to object to its admissibility.

2. **Mechanics' Liens:** SUFFICIENCY OF ACCOUNT. An account which is filed to obtain a mechanics' lien, and which contains but a single item in gross and without detail for the entire contract price of a building, is insufficient to sustain the lien as to that item; and, under the rule above stated, the defendant in an action for the enforcement of the lien may contest the validity of the lien in respect to that item, although the account was received in evidence without objection on his part.

3. **Married Women:** PERSONAL JUDGMENT. A personal judgment cannot be rendered against a married woman for a debt contracted prior to the revision of 1889 of our statutes.

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Appeal from the St. Louis City Circuit Court.—Hon. Daniel D. Fisher, Judge.

Reversed and remanded (*nisi*).

Joseph E. Merryman and *Wm. Moore*, for appellants.

H. A. Loevy, for respondent.

Rombauer, P. J.—This is an action to enforce a mechanics' lien by the contractor against the owners of the property. The claim sued for amounted in the aggregate to $1,814.57, of which amount $1,225 was claimed to be due by the terms of an express contract, and $626 for extra work, the aggregate being subject to a credit of $26.43. The petition contains but one count, including both the express contract and the extra work, but the petition was not challenged on that account. The answer, which purports to be filed by both defendants, contains a general denial, and a counterclaim for damages caused to the defendants by non-performance of the contract. The cause was tried by the court without a jury. No instructions were asked by either party, or given by the court of its own motion. The trial resulted in a judgment for plaintiff for $1,525, and a finding for the plaintiff on the defendant's counterclaim. It thus appears that the court found for plaintiff for the full amount of the contract price, and cut down plaintiff's claim for extra work to the extent of about one-half. The errors assigned are that the judgment is unsupported by substantial evidence; that the court admitted illegal evidence for plaintiff; and that it ruled out evidence offered by the defendants, which was both competent and relevant.

Proceeding to examine these complaints in their inverse order, we find that the record does not contain any exception whatever to the rulings of the court in

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rejecting evidence offered; that question, therefore, is not before us for review.

The record does contain three exceptions to the admission of testimony. The first of these is to the admission of the building contract, which was objected to on the ground that it was void and uncertain, and did not show any contract in any tangible form. As the written contract was executed by the owner of the property and purported to cover the entire subject with which it deals, the objection is without merit. The second is to the admission of a plan of the building, referred to in the contract, and shown by the evidence to have been inspected by the defendants before execution of the latter instrument. This objection is also wholly untenable. The third is to the admission of the lien account, and is the only one worthy of serious consideration.

The trial of the cause was begun on the day on which the plaintiff offered in evidence the lien account. No objection was made to the offer at the time, and the account was thereupon read in evidence. At the conclusion of that day's proceedings, the defendants requested the court to lay over the further hearing to a subsequent day for the purpose of enabling them to adduce evidence showing the value of the extra work. The court granted the request, and postponed the further hearing of the case for the purpose indicated, and no other. On the day to which the further hearing was thus adjourned, the defendant moved the court to exclude from the evidence the bill of items filed with the clerk, and introduced as evidence in this case by the plaintiff (meaning the lien account). The court refused to entertain the motion on the ground that the hearing had been adjourned for the sole purpose of enabling the defendants to adduce evidence as to the reasonable value of extra work, and the case would not be reopened for other purposes.

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The action of the court was not erroneous. The rule in regard to objections to evidence in this state is succinctly stated in the case of *Hannibal & St. Joe Ry. Co. v. Moore*, 37 Mo. 341, thus: "Evidence should be admitted or excluded when it is offered on the trial, and the bill of exceptions should show that the objections were made when the evidence was offered, and the specific ground of objections should be stated at the time, otherwise the objections will be presumed to have been waived. When evidence has been admitted with or without objection, it is proper for the court to give instructions upon the legal effect of such evidence; and, if no sufficient evidence has been introduced to warrant the jury in finding a verdict for the plaintiff, the court may instruct the jury to find for the defendant, unless the plaintiff will take a nonsuit."

This brings us to the controlling question, namely, whether there was substantial evidence to warrant the judgment as far as it affects the lien. If the plaintiff failed to establish any of the essential facts which would entitle him to a mechanic's lien, the judgment must be reversed, even though no objections were made to any part of his evidence. A judgment unsupported by substantial evidence, when challenged on that ground upon appeal from that judgment, cannot stand. The law demands that judgments should be rendered upon sufficient pleadings and substantial evidence, and when they are rendered in opposition to this rule they are judgments against the law. As there was substantial evidence that the plaintiff had performed his contract, and had done extra work at least equal in value to the amount awarded to him by the court on that account, there is nothing for review here on that branch of the case. The evidence also shows that he filed his lien account within the time required by law, and instituted his suit to foreclose his lien in due time. The only question still open is, whether such lien account was the account required by the statute.

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The account filed is as follows:

"St. Louis, September 10, 1889.

"*Mrs. Ellen Capstick, to Bruns & Weiss, Dr.*, Carpenters and Builders, 1518 Leffingwell avenue.

"May 16.

"Contract entered into with Mrs. Ellen Capstick, for a two-story framed house, etc., as per plans for the sum of........................$1,225.
(Twelve hundred and twenty-five dollars, including a two-room frame house, etc.)

"Extras.

Porch, 2 story, 4 feet wide, 24 feet long, including painting, and stairs..................	$120 00
12 openings of windows and doors at $10 each, including paint.........................	120 00
250 feet composition roofing.............	10 00
Plastering 3 rooms.........................	67 00
2,500 feet of joist siding and scantling.......	50 00
500 feet stair Y. P. flooring.................	12 00
Building permit.............................	2 00
Sliding door—extra...........	35 00
Front porch....................	35 00
Extra in and outside painting...............	75 00
Carpenter labor on extra 3 rooms............	100 00
	$626 00
	$1,751 00
Credit by roofing paid tor by order..........	36 43
Balance due.............	1,741 57

It is evident upon an inspection of the first item of this account that it is insufficient as a matter of law. Giving to the item its greatest probative force, namely,

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that the words "contract entered into with Mrs. Ellen Capstick for a two-story frame house as per plans for the sum of $1,225," are inferentially synonymous with "value of labor and material furnished under a contract with Mrs. Ellen Capstick for the erection of a two-story frame house as per plan, $1,225," still the item would, under the decision of the supreme court in *Rude v. Mitchell*, 97 Mo. 365, and the decision of this court in *Smith v. Haley*, 41 Mo. App. 620, be legally insufficient as a statement of an item in a lien account. This is not a case, where the statement of the item is sufficient, and its character as a lienable item depends on outside evidence, as was the case in *Schulenburg & Boeckler Lumber Co. v. Strimple*, 33 Mo. App. 158, but one where the insufficient statement of the item vitiates the lien as to that item. Being an item for which a lien has not been established, it must be rejected from the account as a matter of law. The other items of the account are sufficiently stated, and, as the court specifically found on those items, we might affirm the judgment to the extent of the court's finding on those items; their amount however is insignificant, as compared with the entire recovery, and we will not do so. Nor can we affirm the judgment as a money judgment merely against the defendant Ellen, as she is a married woman, nor against the defendant Samuel, as he is no party to the contract; nor can we make the amount of the judgment a charge in equity upon the defendant Ellen's property, as the necessary data for that purpose are lacking both in the pleadings and evidence. The only disposition we can make of the case is to reverse the judgment and remand the cause, so that the plaintiff may take such action in the premises as he is further advised. So ordered. All the judges concur.

ON MOTION FOR REHEARING.

Rombauer, P. J.—The plaintiff seeks a rehearing and a modification of the judgment. The motion for

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rehearing presents nothing new, nor does it indicate to us how we can come to a different conclusion from the one reached in the opinion under the ruling of the supreme court in *Rude v. Mitchell*, 97 Mo. 365. It is our duty to follow the rulings of the supreme court without criticism. The motion for rehearing must, therefore, be overruled.

We are also asked to modify the judgment by affirming it as a lien judgment to the extent of $300, and as a general judgment for the residue. There is no general judgment to affirm, as none was rendered in the trial court. The trial court was fully aware that a general judgment against a married woman, prior to the revision of 1889, was absolutely void in this state (*Higgins v. Peltzer*, 49 Mo. 152; *Napton v. Leaton*, 71 Mo. 367; *Music v. Dodson*, 76 Mo. 625; *Kerkinson v. Adkins*, 77 Mo. 540; *Coe v. Ritter*, 86 Mo. 283), and that it was wholly immaterial what the nature of the contract was. The fallacy of the argument, that the contract of a married woman, possessing no separate estate, did, prior to the revision of 1889, create a dormant legal obligation on her part, which was made effective by the act of 1889, was exposed by us in *Van Rheeden v. Bush*, 44 Mo. App. 203. The act of 1889 could not constitutionally, even had it attempted to do so, change the character of a contract of a married woman, entered into prior to the time when the law took effect.

If the plaintiff will within ten days dismiss his suit as to the item of $1,225 in this court, we will affirm the judgment of the trial court to the extent of $300, interest and costs, without, however, suggesting in any manner the effect of such dismissal on the $1,225 item as a subsisting claim. If the plaintiff will not do so, the cause will be remanded for new trial according to the mandate of the original opinion.

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FERDINAND A. BENSBERG, Respondent, v. WILLIAM S. HARRIS, Appellant.

St. Louis Court of Appeals, October 27, 1891.

1. **Principal and Agent:** AUTHORITY OF TRAVELING SALESMAN. A sale of goods made by a traveling salesman is not binding upon his principal, if it appears from the uncontradicted evidence that he was authorized merely to solicit or take orders for the goods, subject to the approval of the principal; and the instructions given to him by the principal are conclusive of the scope of his agency, if not enlarged by the ratification of the exercise of greater authority.

2. **Witnesses:** CALLING UPON OPPOSITE PARTY TO TESTIFY: DEPOSITIONS. If one party calls upon the other to testify, or reads in evidence a deposition taken by the opposing party, he in either case vouches for the credit of the witness.

Appeal from the St. Louis City Circuit Court.—HON. JAMES E. WITHROW, Judge.

REVERSED (*and judgment for respondent*).

Pollard & Werner, for appellant.

A party introducing a witness represents him to the court as worthy of credit, and stands as his indorser, and cannot discredit him, though he may contradict him by showing, by other witnesses, that a fact testified to by him is different from that testified to by such witness. 1 Greenleaf on Ev. [14 Ed.] sec. 442, p. 538; 1 Whart. on Ev. [3 Ed.] sec. 549; 2 Best on Ev. [1 Am. Ed.] sec. 645, p. 1080; *Burkhalter v. Edwards*, 16 Ga. 593; *Coulter v. Express Co.*, 56 N. Y. 585; *Hice v. Cox*, 12 Ired. L. 318. Where one party makes the witness of the other party to a suit his own, he is by this rule estopped from discrediting him, and this whether by cross-examination concerning a new matter. *Fairchild v. Bascomb*,

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35 Vt. 417; *Church v. Ins. Co.*, 23 How. Pr. 448. Or by using the deposition taken by the other party. *Richmond v. Richmond*, 10 Yerger, 343; *Cudworth v. Ins. Co.*, 4 Rich. (Law) 416.

A. A. Paxson and *Chas. F. Joy*, for respondent.

Rombauer, P. J.—The defendant is a manufacturer of whiskeys in the state of Kentucky, and, at the dates hereinafter mentioned, J. S. Hackley was one of his traveling salesmen or solicitors, and as such executed the following memorandum of sale:

"St. Louis, April 26, 1890.

"This is to certify that I have sold P. K. Lenehan, of St. Louis:

100 bbls. Ky. Dew Whiskey, made........April, 1889.
100 bbls. Ky. Dew Whiskey, made........May, 1889.
50 bbls. Ky. Dew Whiskey, made........March, April or May, 1888.

"The '89 at forty cents per gallon, and the '88 at fifty-five cents per gallon, cash, and I also guarantee the outage according to the 'Carlisle Bill' on each and every five-barrel lot, storage paid up until May 1, 1890, on all of it, and insurance to hold good until May 10.

"W. S. Harris,

"Per J. S. Hackley."

Lenehan assigned his interest in the contract to the plaintiff, who, upon the defendant's refusal to deliver the goods mentioned, instituted the present action to recover damages for a breach of the contract, and, upon its trial before the court sitting as a jury, recovered judgment. The only error assigned is that there was no evidence showing any authority on the part of Hackley to execute the contract sued upon, and hence no evidence warranting a recovery.

The plaintiff gave evidence showing that he had known Hackley for years, and that Hackley for some time prior to the execution of the memorandum of sale

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had been traveling for the defendant as salesman; that, a few weeks anterior to the execution of the memorandum, Hackley had offered the whiskeys mentioned therein to Lenehan at the prices therein mentioned; that such offer was not accepted by Lenehan at the time, but was subsequently accepted, and orders for the whiskey were sent to the defendant to be filled, which orders the defendant declined to fill on the ground that the prices were below the ruling market rates at the time. There was no evidence that Hackley had stated to Lenehan, or the plaintiff, the extent of his authority as salesman, nor was there any evidence that Hackley had at any time, with the defendant's knowledge or sanction, made an absolute sale of the defendant's goods or that the defendant ever held him out to the public as possessing such authority. The defendant's deposition taken on his own behalf was read in evidence by the plaintiff, and Hackley was the only witness examined by the defendant. It appeared from the defendant's deposition, as a whole, that Hackley was his traveling salesman or solicitor, with authority to send in orders for goods subject to the defendant's approval, which fact was in no way contradicted by the testimony of Hackley.

Such being the evidence, it is apparent that it was wholly insufficient to warrant the judgment rendered. The fact of agency, as well as its scope and extent, may be proved by the habit and course of dealing between the parties (2 Greenl. Ev., sec. 65), but can never be established by the acts and declarations of the alleged agent alone. *Farrar v. Kramer*, 5 Mo. App. 167. Here no course of dealing was shown, which would warrant the finding that the agent had authority to make absolute contracts of sale for his principal, and, in the only instance wherein he had done so, his act was not ratified by his principal.

Evidence of instructions by a principal to his agent are always admissible as original evidence to prove the

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extent of his agency, although when opposed to the agent's acts beyond such authority, sanctioned or ratified by the principal, they are entitled to but little weight. But, when there is no conflict shown between the instructions to the agent and his ratified acts, such instructions become controlling in defining the scope of the agency. The plaintiff in making the defendant his witness, while not bound by his testimony, vouched for his credit. 1 Greenl. Ev., sec. 442; *Coulter v. American Merchants' Union Express Co.*, 56 N. Y. 585. And the same rule applies where one party reads the deposition of a witness taken on behalf of his opponent (*Richmond v. Richmond*, 10 Yerger, 343), as the witness thereby becomes the witness of the party reading the deposition. *Cudworth v. Ins. Co.*, 4 Rich. (Law) 416. As the testimony of the defendant, offered in evidence by the plaintiff, was to the effect that the authority of Hackley was limited to taking orders subject to his approval, and as such evidence stands uncontradicted, it was necessarily binding upon the plaintiff, and should have resulted in a judgment for the defendant.

Proceeding to enter such judgment upon the record as the court below should have rendered, we reverse the judgment, and enter judgment for the defendant. All the judges concur.

GRANT BARNGROVER, Respondent, v. HENRY MAACK, Appellant.

St. Louis Court of Appeals, October 27, 1891.

1. **Professional Services**: TEACHERS: IMPLIED CONTRACT. It is a rule applicable to every learned profession, and, therefore, to that of teaching, that he, who is engaged in the practice of it and is employed to render services appertaining to it, undertakes, in the absence of a special contract, to exercise a reasonable degree of skill and judgment and ordinary care and diligence in the rendition of such services.

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2. ——— : ——— : EXTENT OF IMPLIED OBLIGATION. **This being the extent of the implied obligation, one who contracts to give instruction in specified studies does not warrant that he will pursue the best methods of study.**

3. ——— : ——— : SCHOOLROOM ACCOMMODATIONS. **But a teacher, who undertakes to furnish schoolroom accommodations, impliedly contracts that those furnished will be reasonably fit for the purposes for which they are intended.**

4. ——— : ——— : PROSPECTUS. The proprietor of a private school published a prospectus, in which he stated that the entire tuition would consist of three terms, and set forth the branches of study to be pursued during the first term of his school, and the course and extent of study and the number of lessons per week in each branch. *Held*, that he thereby undertook to instruct his pupils in each of the branches thus enumerated, but that the amount of instruction in each was, within reasonable limits, taking into consideration the time allotted for the entire course, left to his own judgment.

5. **Practice, Appellate**: ADMISSION OF IRRELEVANT EVIDENCE : PREJUDICIAL ERROR. The admission of irrelevant evidence is not necessarily prejudicial error ; whether it is so depends, to a great extent, upon the probability of its having brought about or affected the finding. And *held*, that the admission of such evidence necessitated a reversal of the judgment in the cause at bar, which was one for breach of contract, since it tended strongly to show that an accurate view had not been taken by the trial court of the obligations of the contract alleged to have been violated.

6. **Damages**; SUFFICIENCY OF EVIDENCE. Where damages resulting from the breach of a contract are capable of being estimated by a strict money standard, it is incumbent upon the party claiming them to give evidence of the amount of his damages in dollars and cents ; otherwise, his recovery will be confined to nominal damages. But this is not requisite, where his damages are incapable of being reduced to an exact money standard.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

REVERSED AND REMANDED.

Benj. J. Klene, for appellant.

C. L. Mott, for respondent.

ROMBAUER, P. J.—While this cause involves a small amount, the judgment for plaintiff being for but

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$10, it does involve several legal propositions which are important. The action was instituted before a justice. The plaintiff in his statement claims that the defendant, who is principal of an academy of architecture and building, agreed to instruct him at such academy in certain branches of learning (reciting them), and wholly failed to keep his said promise. There was no evidence of a total failure, but it is claimed that there was evidence of a partial failure, and, as a point is made by the defendant on this variance, we deem it proper to say that, under the liberal rules applicable to statements filed before justices, we do not deem this variance, if there is one, as furnishing just ground of complaint. The only errors assigned worthy of serious consideration are the want of substantial evidence to support the judgment, the admission of irrelevant evidence for plaintiff, and the want of evidence to support any judgment for a definite amount of substantial damages.

The primary question to be determined is the nature of plaintiff's contract. It was decided in *Leighton v. Sargeant*, 27 N. H. 260, a case wherein the opinion is well reasoned, that on principle there can be no difference between contracts governing the various professional services. We adopt the substance of the rule stated in that case as applicable to all professional services, namely, that one who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill, and ordinary good judgment, and engages to use reasonable and ordinary care and diligence in the execution of his skill and the application of his knowledge to accomplish the purpose for which he is employed. In absence of a special undertaking, the rule thus stated is the only just and safe one in defining the obligations assumed by members of a learned profession to parties contracting for their professional services. In case of a teacher, who engages to furnish schoolroom accommodations, the additional duty is necessarily implied that the accommodations

thus furnished shall be reasonably fit for the purposes intended.

In the case at bar a special undertaking to some extent is claimed, by reason of a prospectus published by the defendant, which set forth the advantages of his academy, and stated, among other things, that the entire tuition consisted of three terms, and which set out the course of study for the first term as follows:

"COURSE OF STUDY—FIRST TERM."

	"*Weekly Lessons.*
Arithmetic.—Review of fundamental rules, decimals and common fractions; business arithmetic and algebra as far as equations	6
Plane Geometry.—Definitions, plane figures (including circles), relation of parts	4
Geometrical Drawing.—Instrumental drawing, laws of projections, isometry	8
Physics.—General review of the properties of matter, forces of nature	2
Architecture.—Elements of building, constructions and architectural drawing	10
Architectural Forms.—Moldings and cornices in profile; lettering	4
Freehand Drawing from copies of simple ornaments. Special stress will be placed upon pure and elegant outlines	6
English Literature.—Grammar, composition, including business letters, dictations and short descriptions of building constructions	4
"Total	44.

The plaintiff contracted on the faith of this prospectus, and entered for the first term, paying $40; but, being dissatisfied with the school, he severed his connection with it before the expiration of the term. While we do not hold that by the publication of the prospectus the defendant assumed a literal compliance with its terms unto minute subdivisions of the studies set out in the course of study, we do hold that he did assume to give instruction to the plaintiff in each of the various studies enumerated, but that the amount of instruction in each, within reasonable limits, was to be left to his

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own judgment, taking into consideration the time allotted for the entire course.

Assuming the character of the teacher's contract to be as above stated, the first inquiry which arises is, whether there was any substantial evidence of its breach. Such evidence is claimed in the following particulars: *First.* That the schoolroom was overcrowded. *Second.* That the defendant was not sufficiently familiar with the English language to explain English technical terms to the students, so as to be readily comprehended. *Third.* That he failed to give sufficient and accurate instruction on two subjects, the American bond in bricklaying, and the proper method of joining a tenon and mortise.

On the first point there was evidence tending to show that sixteen persons, including the teacher, were confined in a room of fourteen feet by sixteen feet by ten feet, which would allow only one hundred and forty cubic feet for air and respiration to each individual, and the defendant himself testified that the proper allowance is not less than one hundred and sixty cubic feet. The plaintiff's evidence, however, as to size of room and number of pupils was contradicted by the defendant. There was also evidence on the second point, although the testimony of the defendant himself, as a witness on his own behalf, is embodied literally in the record, and shows a reasonable familiarity with the English language and its technical terms. On the last point there was no substantial evidence, as it is not shown that such a thing as a distinctly American bond in bricklaying is technically known, nor that the method in vogue here of fastening a tenon in the mortise is preferable to the method taught by the teacher. Nor would such facts, if shown, tend to show a breach of the contract, because the teacher's contract, as above seen, was not a warranty to teach the very best methods, but only that he possessed a reasonable degree of skill and care to teach the subjects under consideration. In

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view of the fact that, in determining whether there was any evidence to take the case to the jury, we are bound to give to the plaintiff's evidence its greatest effect, we must conclude that there was substantial evidence of a breach of the contract, and hence that the defendant's motion to withdraw the case from the jury was properly denied.

The mere admission of irrelevant evidence is not necessarily prejudicial error. Whether it is such or not must, to a great extent, depend in every case upon the further question of the probability of its having brought about or affected the finding. If, in this case, the breaches of the contract were made out by clear and uncontroverted evidence, the mere fact that irrelevant evidence was given, tending to show other breaches, would not furnish ground for reversal. It is claimed by the defendant that irrelevant evidence was admitted against his objection on the following points: Whether certain subdivisions of the studies mentioned in the course of studies were taught; whether the teacher had other classes, it not appearing that the teaching of such classes consumed any of the time to which the plaintiff's class was entitled; and whether any student ever graduated from the defendant's academy. We must hold that neither of these questions had any tendency to show a breach of the contract on the defendant's part, as above defined, and that, under the state of the rest of the evidence, the admission of such evidence was prejudicial. It was evidence which was uncontradicted, and its admission against the defendant's objection has a strong tendency to show that the court did not take an accurate legal view of the obligations assumed by the defendant. This error necessitates a reversal of the judgment.

In view of a possible retrial of the case, we deem it proper to say that the defendant's third complaint is untenable. Where damages resulting from the breach

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of a contract are capable of being estimated by a strict money standard, it is incumbent upon the plaintiff to give evidence of his damages in dollars and cents; otherwise, his recovery will be confined to nominal damages. This, however, is never the case where his damages are incapable of being reduced to an exact money standard.

We have given more time to the investigation of this case than the slight amount involved seems to demand, because in some respects it is a case of first impression. A proper administration of justice demands that, while on the one hand courts should be careful to throw a proper safeguard around the student, so as to protect him from imposture, they should, on the other, protect the teacher in his contract, and not prevent him from earning a livelihood by the exercise of his profession, so long as he brings to its exercise that reasonable care, skill and diligence, which, in the absence of a special contract, is all that the law demands of him.

All the judges concurring, the judgment is reversed and the cause remanded.

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JOSEPH P. VASTINE, Respondent, v. DAVID BAILEY, Appellant.

St. Louis Court of Appeals, October 27, 1891.

1. **Justices' Courts:** SETTING ASIDE AFFIRMANCE OF JUDGMENT FOR NON-PAYMENT OF FILING FEE. When the circuit court affirms the judgment of a justice of the peace for non-payment of the filing fee by the appellant, pursuant to the special statute applicable to the city of St. Louis, it has power to set aside the affirmance, and reinstate the cause during the same term, if the appellant shows sufficient excuse for the non-payment of that fee.

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2. **Practice, Appellate:** REVIEW OF DISCRETIONARY RULINGS. The exercise of this power addresses itself to the sound discretion of the circuit court, and the refusal of that court to set aside its affirmance of the justice's judgment may, therefore, be reviewed and corected on appeal, when a strong case for setting aside the affirmance is presented.

Appeal from the St. Louis City Circuit Court.--HON. DANIEL DILLON, Judge.

REVERSED AND REMANDED.

Gerolt Gibson, for appellant.

B. F. Clark, for respondent.

THOMPSON, J.—In this case a judgment was rendered in favor of the plaintiff, and against the defendant, by a justice, and the defendant duly took an appeal to the circuit court of the city of St. Louis, and deposited with the justice the filing fee required by the special statute relating to that court. The justice lodged the papers and his transcript with the clerk of the circuit court, but failed to pay the filing fee to the clerk. Thereupon, the plaintiff paid to the clerk the filing fee, and moved to have the judgment of the justice affirmed, which was done. The defendant then appeared and moved to have the judgment of affirmance set aside, and filed affidavits showing that he had, when the appeal was taken, deposited the filing fee with the justice, requesting him to pay it to the clerk when he should lodge the papers with the clerk; and, further, that, after this had been done, the defendant's attorney went to the justice and inquired of him whether everything had been done which was necessary to perfect the appeal, and was answered by the justice in the affirmative. This showing was not controverted, so far as the record shows, and there is no reason to doubt the truth of the affidavits. The court nevertheless refused

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to set aside the judgment of affirmance, and the defendant appeals to this court.

The general statute relating to justices (R. S., sec. 6337) imposes the duty of filing the transcript and papers in the office of the clerk of the circuit court *upon the justice*, and provides that his failure to do so shall not affect the appeal; but the special statute relating to the circuit court of the city of St. Louis, already referred to, imposes the duty of paying the filing fee *upon the appellant.* R. S. 1889, p. 2148, sec. 17. These two statutes taken together present the incongruity, that the papers and transcript are to be returned to the clerk of the circuit court by one person, and the filing fee is to be paid by another. It is obviously more convenient and less productive of confusion to have both duties performed by one person and at the same time. The practice has, therefore, sprung up among the bar of the city of St. Louis to pay the filing fee to the justice, and for the justice to turn it over to the clerk when he lodges the papers and his transcript with the clerk; and it is known to one of the judges of this court that such has been the practice in St. Louis for many years. All this was done by the appellant in the present case, and more; the appellant's attorney, out of abundant caution, went to the justice and inquired of him whether everything necessary to be done had been done, and was answered that it had. This, it may well be understood, induced in him a feeling of security, which prevented him from making a similar inquiry in the office of the clerk of the circuit court.

The circuit court committed no error in affirming the judgment in the first instance. *Dalton v. McCaffery*, 20 Mo. App. 61; *Wilson v. Ryan*, 15 Mo. App. 597; *Bailey v. Lubke*, 8 Mo. App. 57; *Hardison v. Steamboat*, 13 Mo. 226. But whether, on the showing which the defendant made, the court abused its discretion in refusing to set aside its judgment of affirmance, is a different question. We use the phrase

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"abused its discretion" merely in the usual legal sense, and not in the harsh sense which would carry any imputation against the careful and conscientious judge who made the ruling complained of in the present case. We make this observation in view of the fact that the learned judge may have been led into the ruling by the observation of this court in its opinion in *Dalton v. McCaffery*, 20 Mo. App. at page 62, that "we are not concerned with the reasons upon which trial courts exercise, or refuse to exercise, their discretion, unless where it appears that they have proceeded upon erroneous views of the law." We think on reconsidering the question that this expression states the general rule too strongly; for, if literally true, there could be no review of discretionary action or non-action in any case. We reaffirm the view stated in the succeeding paragraph in the same opinion, that, "in such a case as that presented by the record, the circuit court has power, upon the payment by the appellant of the filing fee, and the showing of a sufficient excuse for failing to pay it, as required by the statute, to set aside a judgment of affirmance, and to reinstate the cause within the term, when the judgment of affirmance is rendered. But the exercise of this power addresses itself to the sound discretion of the court, and it is a settled rule of appellate procedure, that rulings which involve a mere exercise of judicial discretion cannot be reviewed on appeal, unless the discretion has been plainly abused." We add that, in our opinion, where a case calls strongly for an affirmative exercise of the court's discretion in a given instance, a refusal of the court to exercise it is a subject of appellate review, equally with an affirmative abusive exercise of discretion.

Such, in our judgment, was the present case. The appellant did all that is usually done in such cases to prosecute his appeal so as to have a retrial in the circuit court upon the merits. His attorney went further and ascertained, upon inquiry of the justice,

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that all this had been done. All this is shown by affidavits which are not controverted, and which there is no reason to doubt. Then, if this ruling is to stand, because of the mere inadvertence of the justice in failing to pay over the filing fee to the clerk, the appellant is, notwithstanding the showing of these facts, and his additional affidavit of merits, to be deprived of the benefit of his appeal. This case is distinguishable on its facts from *Dalton v. McCaffery*, *supra*, in this, that in that case no diligence whatever was shown; there was only an affidavit of merits.

We take the view that, upon appellant repaying to the respondent the filing fee which the respondent paid to the clerk of the circuit court when he made his motion to affirm the judgment, and paying to the clerk the costs caused by the affirmance and reinstatement, the circuit court should set aside its judgment of affirmance and reinstate the cause upon its docket; and the judgment is reversed, and the cause remanded with this direction. All the judges concur.

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THE WHITE SEWING-MACHINE COMPANY, Appellant, v. TONY BETTING, Respondent.

St. Louis Court of Appeals, October 27, 1891.

1. **Principal and Agent:** LIABILITY OF PURCHASER FROM AGENT. One who purchases goods from an agent, knowing, or having good grounds for believing, that, in selling them, the agent is exceeding his authority and acting in fraud of his principal, obtains no title, but is guilty of a conversion of the goods.

2. **Trover:** DEMAND. When the original taking of goods is tortious, an action for their conversion will lie without any demand for them.

Appeal from the St. Louis City Circuit Court.—HON. JACOB KLEIN, Judge.

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REVERSED AND REMANDED.

John A. Gilliam, for appellant.

There was evidence of Goodwin's agency being special; also evidence tending to show Betting's knowledge of the limitation of Goodwin's authority; also that the goods were not bought in the ordinary course of business, all of which should have been submitted to the jury, and Betting had information sufficient to put him upon inquiry. *Mfg. Co. v. Hudson*, 4 Mo. App. 145; *Kaufman v. Beasley*, 54 Tex. 568; *Wooters v. Kaufman*, 73 Tex. 395; *Tuttle v. Campbell*, 74 Mich. 660; *Spaights v. Hawley*, 39 N. Y. 441; Story on Agency [9 Ed.] secs. 133, 131, 165, 170, 437, 229, 231; *Fellows v. Wise*, 55 Mo. 413; Wells on Replevin, sec. 312; *Ech v. Hatcher*, 58 Mo. 235; *Schimmelfenich v. Bayard*, 1 Pet. 290; *Leavitt v. La Force*, 71 Mo. 354; *Meyer v. Blume*, 80 Mo. 184; *Mach. Co. v. Warford*, 1 Sweeney, 433.

C. F. Bauer and *C. L. Mott*, for respondent.

(1) If an agent is intrusted with the possession of personal property, to sell and account to his principal for the proceeds, and sells it to a *bona fide* purchaser for value without notice, the purchaser takes a good title. The purchaser's obligations end with his payment, and he is not bound by the private instructions from the principal to the agent; and the principal is estopped from making any demand upon the purchaser. It is immaterial whether the article was given to the agent for the purpose of sale, or whether he borrowed it. *Carmichael v. Buck*, 70 Am. Dec. 226; *Dias v. Chickering*, 1 Cent. 479; *Jennings v. Gage*, 10 Ill. 610. When the principal puts the agent forward as a general agent, or places him in a position where others are justified in the belief that his powers are general, the

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restrictions that may be imposed privately upon the agent will be immaterial except, as between him and the principal, and can have no effect on the rights or remedies of third persons who have no knowledge of the restrictions or limitations upon his apparent authority. *Baker v. Railroad*, 91 Mo. 152; *Commercial Co. v. State*, 113 Ind. 331; *Towle v. Leavitt*, 23 N. H. 360; *Ins. Co. v. Maguire*, 51 Ill. 342; *Webster v. Wray*, 17 Neb. 579. (2) The evidence fails to show either an unlawful taking by defendant, or some use or appropriation to his use, indicating a claim of right in opposition to the right of the owner; or, lastly, a demand made on him. This is fatal. *Bank v. Metcalf*, 40 Mo. App. 494; *Nanson v. Jacobs*, 93 Mo. 304.

THOMPSON, J.—This was an action in the nature of trover for a conversion of two sewing machines of the plaintiff's manufacture, called No. 3 White Sewing Machines. There was a trial before a jury, and at the close of the plaintiff's evidence the court instructed the jury that the plaintiff could not recover. The propriety of this ruling is the only question we have to consider.

We are constrained to take a different view of the legal effect of the evidence from that taken by the trial court. It tended to show that the plaintiffs were manufacturers of sewing machines; that they sold the kind of machines in controversy (their No. 3), at retail in St. Louis at the rate of $50 for cash and $60 on credit; that the defendant was a dealer in sewing machines in St. Louis, and knew the retail price of this kind of machine; that one Goodwin was the canvassing agent of the plaintiffs in St. Louis, with authority to sell their machines in St. Louis at the retail price, and to take second-hand machines in exchange for them on certain conditions, and with no other authority; that the defendant knew that Goodwin was a canvassing agent of the plaintiff; that, knowing this, he bought from Goodwin the machines in controversy and one

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other, also the subject of a controversy,—designated by a witness as "the three machines in dispute,"—for $24 each,—less than half their retail price for cash; that, when Goodwin offered to sell him these machines, he (Goodwin) told him that he was obliged to raise some money; that he needed it, and that he would sell him the machines; and that thereafter defendant obliterated the numbers engraved on the plate attached to each machine, so that the identity of the particular machine could not be traced.

It is not necessary to consider what the rights of the parties would be upon the assumption that the evidence tended no further than to show that Goodwin, having authority to sell, merely exceeded his authority, and that the defendant purchased in good faith without knowing that fact. The evidence would have warranted the jury in finding that the defendant knew that Goodwin had no authority from the plaintiff to sell the machines for $24, and further that he proposed to sell them not for the plaintiffs, his principals who owned them, but to raise money for himself.

This brings the case within the principle which governed the case of *Singer Mfg. Co. v. Hudson*, 4 Mo. App. 145, which is, that one who purchases goods of an agent, knowing or having good grounds for believing that the agent in selling them is exceeding his authority and acting in fraud of his principal, gets no title to them, but is guilty of a conversion of them. This is much more clearly so where he knows, or has good ground for believing, that the agent is selling not for his principal, but to effect some purpose of his own.

II. There is a further point that no *demand* was proved in this case. The statute (R. S. 1879, sec. 1018; R. S. 1889, sec. 2948) dispenses with a demand in actions for property as well as for money. This statute seems to have been restrained by the supreme court to cases where the original taking or possession was tortious (*Nanson v. Jacob*, 93 Mo. 331); yet on general

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principles no demand is necessary where there has been a conversion without it (*LaFayette Co. Bank v. Metcalf*, 40 Mo. App. 502), and especially where the original taking is of such a nature as of itself to amount to a conversion.

The judgment will be reversed, and the cause remanded. All the judges concur.

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111m	237
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THE STATE OF MISSOURI, Respondent, v. HENRY SEARCY, Appellant.

St. Louis Court of Appeals, October 27, 1891.

1. **Appeals:** VALIDITY OF CREATION OF TRIAL COURT. The question of the legal existence of the trial court cannot be raised on appeal.

2. **Local Option:** BURDEN OF PROOF. The adoption of the local-option law is established *prima facie* by the state by the production of a certified copy of the result of the election, as spread upon the records of the county court in compliance with that law, and proof that the requisite subsequent publication of the result was made. (*State v. Searcy*, 39 Mo. App. 393, *is approved.*)

3. **Elections:** CERTIFICATE OF ELECTION. *Held, arguendo*, that in the case of a general election, the county clerk is required to take to his assistance two justices of the peace, or two judges of the county court, only for the purpose of aiding him in examining and casting up the votes given to each candidate, and that these two justices or judges are not required to sign the certificate of election given to the candidate having the highest number of votes.

4. **Local Option:** CERTIFICATE OF ELECTION. It is not essential to the validity of the election, putting the local-option law in force in any locality, that any certificate of the election should be signed by the two justices or the two judges of the county court, called in to aid the county clerk in casting up the votes.

5. **County Court Records:** PRESUMPTIONS. It is presumed that the county court orders everything, which appears upon its records, to be recorded therein.

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6. **Local Option:** SALES BY DRUGGISTS. A person who is indicted for a violation of the local-option law, and defends on the ground that he is a licensed druggist and as such made the sale of liquor for which he is indicted, must bring his sale within the provisions of the law relating to such sales by druggists, and, where the sale is for medicinal purposes, must, therefore, show a physician's prescription.

Appeal from the Christian Circuit Court—HON. M. OLIVER, Judge.

AFFIRMED (*and certified to supreme court*).

O. H. Travers and *Harrington & Pepperdine*, for appellant.

J. H. Duncan and *James R. Vaughan*, for respondent.

THOMPSON, J.—The defendant was indicted in the criminal court of Greene county for selling a half pint of alcohol in violation of the statute, known as the local-option law (R. S., sec. 4598), alleged to have been duly put in force in Greene county by an election under the provisions of that statute. A change of venue was taken to the circuit court of Christian county, in which there was a trial which resulted in a verdict of guilty, and in the imposition of a fine of $300. From this judgment the defendant prosecutes this appeal.

I. In the circuit court of Christian county defendant moved to quash the indictment for the reason, in substance, that the criminal court of Greene county had no valid existence, by reason of the fact that the constitution (art. 6, sec. 31) prohibits the legislature from establishing criminal courts, except in counties having a population exceeding fifty thousand, alleging that Greene county had not at the date when the act creating the court was passed, and has not now, a population exceeding fifty thousand, and appealing to the national census as evidence of that fact, of which the

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courts take judicial notice. The circuit court of Christian county overruled this motion, and it is renewed in this court. The position of the defendant upon this question is, that this is a jurisdictional question which can be raised at any stage of the proceedings in a criminal case; that, by reason of the fact, as shown by the national census of 1880, and also by the national census of 1890, that the county of Greene had not, either at the time when the legislature established that court, or at the present time, fifty thousand inhabitants, and of the consequent constitutional inability of the legislature to create that court, the court never had any legal existence; and that, as the court itself never had any legal existence, the doctrine which upholds the acts of *de facto* courts has no application, the argument being that there can be no such thing as a *de facto* judge, unless there is a *de jure* court.

If this question is properly raised upon this record, it is our duty to send the case to the supreme court in the first instance, for want of any jurisdiction in this court to determine constitutional questions. But we are of opinion, after giving careful consideration to the matter, that the question does not at all arise upon this record. We are of opinion that, from the very nature of things, the question of the legal existence of a court cannot arise upon an appeal from a judgment in a proceeding commenced in that court. For instance, in this case, if there was no such court as the criminal court of Greene county, then there was no case to be tried, or in any way considered, by reason of the change of venue in the circuit court of Christian county; nor is there any case to be heard, or in any way considered, in this court, by reason of an appeal from the last-named court. The very act of taking a change of venue from the criminal court of Greene county to the circuit court of Christian county, under the statute, presupposes that there was a court, and a cause depending in a court, from which a change of venue could be thus taken; and the very act

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of appealing from the judgment in this cause of the circuit court of Christian county to this court presupposes in like manner the valid existence, for the purposes of this proceeding, of a court in which an appealable proceeding could be commenced. If the position of the appellant on this point is correct, there is no case for us to determine here, and nothing for us to do but to strike the supposed appeal from our docket. Certainly it would not be contended that an appeal can be taken from an order of a private citizen who pretends to act as a court, when no such court in fact exists.

Neither we, nor, it may be assumed, the supreme court if the cause were transferred to it, could render any judgment or take any action upon the motion, which could not have been done in the criminal court, if the motion had first been made there. But, upon what theory can it be contended that the criminal court of Greene county had jurisdiction to adjudge its own nonexistence as a court? How can a court adjudge that it is not a court? What authority is conferred by the constitution or the laws upon a court of justice, acting as a court, to commit suicide?

But, if we could entertain this motion, what judgment could we render in deciding it? Could we reverse the judgment of a court, which rests its jurisdiction by derivation upon an indictment found in a court which does not exist? Could we discharge the defendant from paying a fine in a matter, where there is no cause depending before us? Could we send a mandate to the judge and clerk of the criminal court of Greene county, commanding them to desist from acting as a court? Clearly we could not, for the reason, if for no other, that they are not before us as parties for any purpose. What, moreover, would be the public effect of any possible judgment which we might render sustaining this motion? The judge and clerk of the criminal court of Greene county would go on holding their court as heretofore, and we should have the incongruous spectacle

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of a court good for the purposes of one case, and bad for the purposes of another.

We are supported in this conclusion by the decision of the supreme court in *State v. Rich*, 20 Mo. 393, and by the conclusive reasoning of Judge LEONARD in giving the opinion of the court in that case. There the court held that the constitutionality of a law establishing a new county could not be inquired into on a motion to quash an indictment found in a court of such county. He pointed out the absurdity of supposing that a court established by law could adjudge itself to be a nullity. He concluded by saying: "It would, indeed, be impracticable to act upon any such principle. If, whenever any act done under the authority of the law came in question collaterally, the constitutionality of the law could be contested, then the trial of the main issue must necessarily be delayed until the preliminary fact, upon which the validity of the contested legislative act depended, should first be tried and determined upon testimony, which, being different in different cases, might involve the absurdity of deciding the law constitutional one day, and unconstitutional the next. But we need not press these things farther; the result is manifest; all such inquiries must be excluded whenever they come up collaterally, and the county, its courts and its officers must be treated as things existing in fact, the lawfulness of which cannot be questioned, unless in a direct proceeding for that purpose."

It is, no doubt, too broad an expression to use, to say that the question which is here presented cannot be raised collaterally in any case. Such a question was raised under the writ of *habeas corpus* in *Ex parte Snyder*, 64 Mo. 58. In that case, a person who had been convicted and sentenced to imprisonment by a supposed or pretended court, called the probate and criminal court of Cass county, applied to the supreme court for a *habeas corpus*, and was by the court discharged from

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custody, on the ground that no such court as the probate and criminal court of Cass county had a legal existence; that there could not be a *de facto* judge without a *de jure* court, and that the question could be raised on *habeas corpus*. But such a case is clearly distinguishable from a case where it is attempted to raise the question in a proceeding removed or appealed from the very court whose existence as a court is attacked. There was nothing in that proceeding, which from its nature presupposed or admitted the legal existence of the probate and criminal court of Cass county. On the contrary, that was an original and summary proceeding, commenced in the supreme court and directed against the sheriff of Cass county, as a ministerial officer holding a citizen in custody without any warrant of law. If he derived his authority from the warrant of a judge and a clerk pretending to constitute a court, which had no legal existence, he was simply holding the prisoner under void process, and acting as a mere trespasser; and the writ of *habeas corpus* is of such a summary nature that it may well be admitted that such a question could be raised, at least in the supreme court of the state, which would have jurisdiction to determine it by *quo warranto* in that proceeding. It is no authority for holding that it can be raised in such a proceeding as this. We accordingly overrule this assignment of error.

II. The next objection, stated in the most general way, is that the state failed to show that the statute, known as the local-option law, had been regularly put in force in Greene county by a valid election, a proper canvass of the votes, and a publication thereof under the terms of that law. In deciding this question we shall adhere to the view, which we took of the same question in *State v. Searcy*, 39 Mo. App. 393, 407, where we used this language: "The state assumed throughout the burden of alleging and proving the various steps by which the local-option law had been adopted in the

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county. We hold that this is unnecessary. We hold that it is sufficient for the indictment to allege that the act of the legislature, approved April 5, 1887, commonly known as the local-option law, has been adopted, and is in force within the county (or city, or limits of the county outside of a city or cities of twenty-five hundred inhabitants, as the case may be), on the day on which the offense is charged. We also hold that the state makes good this allegation by producing a certified copy of the result of the election, as spread upon the records of the county court, in compliance with section 1 of the statute, and also by proving that subsequent publication of the result was made in compliance with the statute. A valid election in compliance with its terms is necessary to the adoption of the statute, and the record made by the county court of the result of the election is *prima facie* evidence of that fact. A publication of the result of the election, in compliance with the terms of the statute, is also necessary to put the law in force, and consequently such publication must be proved. We further hold that, after the state has thus shown, *prima facie*, that the statute had been adopted and put in force prior to the date of the offense, it is open to the accused to show the contrary by proving that any of the essential steps named by the statute have not been taken,—except as to those matters where the county court is required judicially to determine the existence of a fact, in which its record is conclusive,—as for instance in respect of the question, whether the petition for the election has been signed by the requisite number of qualified voters."

In the present case the state complied with this requirement, so far as its proof was concerned, by putting in evidence a certified copy of the result of the election, as spread upon the records of the county court, and also by proving that the subsequent publication of

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the result had been made in compliance with the statute.

III. But, directing attention more specially to the manner in which this question is now raised by the appellant, it is this: That the statute relating to elections, in conformity with which by the terms of the local-option law this election was required to be held and the vote canvassed, contains this provision: "The clerk of each county court shall, within five days after the close of each election, take to his assistance two justices of the peace of his county, or two judges of the county court, and examine and cast up the votes given to each candidate, and give to those having the highest number of votes certificates of election." R. S., sec. 4684. It is argued that this section has the effect of creating a canvassing board, to be composed of the clerk of the county court, and also of two justices of the peace or two county judges, whom he is required to call to his assistance; that this canvassing board is the official body created by law to canvass the votes, and cast up and declare the result; that this board, acting collectively as a board, must make and sign a certificate of the result to be presented to the county court, and by the court spread upon its record; that such a canvassing of the vote, and such a certificate of the result, concurred in, and signed, by the canvassing board, is necessary to the validity of any election under the local-option law; and hence that, as it nowhere appeared that the clerk called to his aid, in canvassing the votes in the present case, two justices of the peace or two county court judges, and as it does not appear that a certificate of the result by such a canvassing board was made, and presented to the county court, and spread upon its records, the election is of no validity.

The appellant refers us to two decisions of the Kansas City Court of Appeals, where this view, in substance, was held. *State v. Mackin*, 41 Mo. App. 99; *State v. Prather*, 41 Mo. App. 451. The appellant also argues that there

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is no conflict between the Kansas City Court of Appeals in these two cases, and our holding in *State v. Searcy, supra.* But we find that these holdings are in irreconcilable conflict with the view which we took in the case last named. The view which we took is founded upon what we understand to be the grammatical construction of the statute (R. S., sec. 4684), and it is th's: *First.* That the *clerk* of the county court, within five days after the close of the election, takes to his assistance two justices of the peace, or two judges of the county court. *Second.* That the *clerk* then examines and casts up the votes given to each candidate. *Third.* That the *clerk* then gives to those having the highest number of votes certificates of election, or (in its application to the local-option law) makes a certificate of the election for the purpose of having it spread upon the records of the county court, as required by section 1 of that law. Undoubtedly, the intention of the statute is, that the two justices or judges called in by the clerk shall assist him in casting up the votes and ascertaining the result; otherwise the language of the statute, which requires him to take them to his assistance, would not receive its proper value. But we do not understand that the justices or county judges, called by the clerk to his aid, are required to join with him in certifying the result, or, in the case of an election for county offices, in signing the certificate to be given to the candidate having the highest number of votes. We further understand that it has not been the general practice in this state for the justices or the county judges, called to the aid of the clerk, to join with him in making this last named certificate.

The question does not appear ever to have been directly decided by the supreme court, but there are decisions of that court, the language of which conveys implications on both sides of the question. In *State ex rel. v. Harrison*, 38 Mo. 540, there is language implying that the duty of making the certificate is on the

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clerk alone, and the same implication seems to be contained in the language of the court in *State ex rel. v. Steers*, 44 Mo. 223. But in *State ex rel. v. Garesché*, 65 Mo. 480, the language of the court contains the contrary implication; and in the *Garesché case* a *mandamus* was directed both against the clerk and the two justices whom he had called to his aid in canvassing the votes; but it was to compel them to count certain votes which had been rejected. In none of these cases was the question presented, which is now before us. The statute is obscure; the question is not without difficulty, and the view of the Kansas City Court of Appeals is ably and persuasively stated by Judge GILL in giving the two opinions of that court already referred to; but we rest our conclusion on the consideration, that there is no statute requiring any certificate of election to be made and signed by the whole canvassing board, and no statute relating to the local-option law, which requires any such certificate to be made and signed at all. We do not see how the validity of an election can be made to depend upon the formal execution of a document, which no statute requires to be executed at all.

In the present case the paper spread upon the records of the county court does not recite the manner in which the vote was canvassed, nor is it certified to, either by the clerk or by a canvassing board; and it is consistent with the conclusion, that the act might have been performed by the clerk, under the eye of the county court judges while sitting as a court, as contended by the appellant, but for the fact that a court cannot, under the principles laid down by us in our former decision in the *Searcy case*, indulge in presumptions of wrong-acting, where presumptions of right-acting are equally consistent with what appears. Evidence was given by the state, through the mouth of the clerk of the county court of Greene county, that such a certificate of the result of their election had been made by him and filed in the archives of the

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county court; and the deputy clerk of the county court of Greene county testified to the effect, that this certificate had been lost and could not be found. This fact shows the great inconvenience and public danger of the principle, for which the appellant here contends. There is no provision in the local-option law, or in any other statute which has been called to our attention, requiring the certificate which the county court clerk (or the county court clerk and the justices or judges, if the appellant's view be taken) makes of the result of the election to be spread *in hæc verba*, upon the records of the county court, there to be preserved as a permanent memorial of the fact. Section 1 of the local-option law (R. S., sec. 4598) only requires that the result of the election shall be entered upon the records of the county court, and that is shown to have been done in this case. It is not by virtue of an express provision of law with which we are acquainted, but only by analogy to the statute relating to elections for public officers (R. S., sec. 4684), that we assume in the *Searcy case* that such a certificate is required at all. As there is no statute requiring it to be spread *in hæc verba* upon the records of the county court, it appears that it may be as lawfully kept in the custody of the county court clerk among his office files, as any other paper may be so kept. If, then, the position of the appellant is correct, and if the validity of an election putting in force the local-option law is to be tried on the appellant's theory in every prosecution under that law, it follows that the permanent existence of the law is put to the hazard of the preservation of this single paper, and that the accidental loss of the paper, or the purloining of it by an interested person, may render it impossible to prove in any case, after such loss or purloining, that the law was properly enacted and put in force. This consideration satisfies us of the soundness of our conclusion in *State v. Searcy*, 39 Mo. App. 393.

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The further argument of the appellant, that there must be an order of record of the county court, admitting this certificate to its record is not tenable, since it is presumed that the court orders to its record everything which there appears.

IV. The circuit court refused to allow the defendant to show by way of defense to the merits that, although he had sold the half pint of alcohol as charged in the indictment, yet that he was a duly licensed druggist, and that he sold the alcohol for medicinal purposes and in good faith, although without any prescription by a physician. In this ruling of the court there was no error. The local-option law (R. S., sec. 44605) contains this provision: "Nor shall anything herein contained prevent licensed druggists or pharmacists from furnishing pure alcohol for medicinal, art, scientific and mechanical purposes." The statute relating to druggists (R. S., sec. 4621) makes it a misdemeanor for any druggist to sell or give away alcohol in less quantities than four gallons, except on a written prescription of a regularly registered and practicing physician. In our opinion the two statutes are not in conflict, and the local-option law does not displace the druggist law, and the two are to be construed together *in pari materia.* The local-option law does not interfere with the operation of the druggist law at all. *Ex parte Swann*, 96 Mo. 44. The provision from the local-option law above quoted is rather to be construed as referring to the provisions of the druggist law already in force, and to preserve in full operation those provisions. We agree with the Kansas City Court of Appeals that the druggist law was designed to cover all the ground in relation to sales by druggists and pharmacists, without reference to other statutes. *State v. Piper*, 41 Mo. App. 164. It necessarily follows that a person indicted for a violation of the local-option law, who defends on the ground that he is a licensed druggist, and that he sold the liquor as such in his character as a druggist,

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must show a state of facts which brings him within the provisions of the law relating to the sale of liquor by druggists,—in other words, where it is sold for medicinal purposes he must show a physician's prescription. *State v. Moore*, 16 S. W. Rep. 937.

It results, in our opinion, that the judgment of the circuit court of Christian county should be affirmed. We so order. But, as there is a conflict of opinion between the decision of this court in the present case, and the decision of the Kansas City Court of Appeals in *State v. Mackin*, 41 Mo. App. 99, and *State v. Prather*, 41 Mo. App. 451, as above stated, upon the question of the mode of canvassing the votes of an election under the local-option law and certifying the result, we must, under the constitutional mandate, certify this cause to the supreme court for final determination. It is so ordered. All the judges concur.

SILAS JOHNSON, Respondent, v. JOHN B. LABARGE *et al.*, Appellants.

St. Louis Court of Appeals, October 27, 1891.

Practice, Trial: INCONSISTENCY OF VERDICT. A verdict which is inconsistent in its several findings cannot stand, unless it appears that the party objecting to it has not been prejudiced. And *held*, accordingly, that the verdict in this cause could not stand, since by it the jury found for the plaintiff in a count for damages for the non-performance of a contract, and at the same time found for the defendant for the full contract price on a counterclaim, based upon the same contract.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

REVERSED AND REMANDED.

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Laughlin, Kern & Tansey, for appellants.

Frank Hicks, for respondent.

THOMPSON, J.—The plaintiff brought this action to recover $1,500 damages, alleged to have been caused by the failure of the defendants properly to perform a contract, whereby they had agreed with the plaintiff to shore up the east wall of a certain house belonging to the plaintiff. The answer, after a general denial, set up, as a counterclaim, the right to recover of the plaintiff the sum of $150, the contract price of performing the work; and also another counterclaim for $5.20, upon which last counterclaim no question arises. The plaintiff, by a reply, controverted the right of the defendants to maintain their first counterclaim, on the ground that they had failed properly and skilfully to perform the work according to the contract, whereby the plaintiff had been damaged, as alleged in the petition.

The trial was had before a jury, and the plaintiff gave evidence tending to show that he had been damaged by reason of the failure of the defendants to perform the work in a careful, and skilful manner, in a sum between $150 and $400, and that these damages consisted in the plaintiff's wall settling, and the plastering cracking, etc. The defendants, on the other hand, gave evidence tending to show that the work had been done in a careful, skilful and workmanlike manner, and in the manner in which such work is usually done. The defendants' evidence also tended to show that some settling and injury, such as the plaintiff according to his testimony sustained, is in many cases unavoidable.

The jury returned a verdict for the plaintiff on the cause of action stated in the petition, in the sum of $125, and for the defendants, on each of their counterclaims, in the full sum demanded. The defendants' recovery thus exceeded that of the plaintiff in the sum of $35.20, and judgment was entered in the defendants' favor for

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that amount. To reverse this judgment the defendants appeal.

I. It is assigned for error that the court refused the following instruction: "The court instructs the jury that the only question for them to consider is, whether or not the east wall of plaintiff's house, mentioned in evidence, was protected and underpinned by defendants in a skilful and workmanlike manner, and, if the jury believe that, after said east wall was underpinned and protected, it was not left in a damaged condition, then plaintiff cannot recover in this case." It is plain that no error was committed in refusing this instruction, because the question therein stated was not the *only* question to be considered by the jury; there were two other questions arising under the two counterclaims.

II. Complaint is also made that the verdict is contradictory and absurd, and this assignment of error seems to be well taken. The defendants' counterclaim is in the nature of an action *upon the contract*—not upon a *quantum meruit*. It sets up the contract to do the work of shoring up the plaintiff's wall for the agreed sum of $150, alleges due performance of the contract on the part of the defendants, and the refusal of the plaintiff to pay the price agreed upon. The jury, in finding for the defendants on this counterclaim for the full amount of the contract price of doing the work, have necessarily found that the contract was not broken, but that the work was properly performed according to its terms; but, at the same time, they have given the plaintiff damages under his petition in the sum of $125, which could only have been properly given upon the assumption that the contract was not properly performed. Both of these propositions cannot be true. It is demonstrably certain that, if the defendants performed their contract, the plaintiff is entitled to nothing for its breach; and, on the other hand, it is equally certain that, if the plaintiff is entitled to anything for its

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breach, the defendants are not entitled to compensation for its full performance.

The verdict is, therefore, the result of a manifest mistake, and cannot be allowed to stand, unless we can plainly see that the defendants are not prejudiced by it. But we cannot see which party is prejudiced by it without retrying the case upon the evidence, which it is not within our province to do. Either party might have appealed and alleged prejudice upon the verdict. The plaintiff might have said: "The jury have found that I am entitled to damages by reason of the failure of the defendants to perform their contract with me. Since I am entitled to damages for their breach of the contract, they cannot recover on the contract for its full performance." The defendants, on the other hand, are equally entitled to say: "The jury have found on our first counterclaim that we have fully performed our contract, and, having awarded us the full agreed price for its performance, cannot properly find, under the plaintiff's petition, that we have broken it and award him damages for its breach."

Our conclusion is that the trial court should have set aside this verdict and awarded a new trial; and the judgment is accordingly reversed, and the cause remanded with the concurrence of the judges.

MARGARET VAN STUDDIFORD, Appellant, v. ANTHONY KOHN, Respondent.

St. Louis Court of Appeals, October 27, 1891.

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1. **Landlord and Tenant:** SERVICE OF NOTICE TO QUIT. A store in the city of St. Louis was held by the storekeeper without any contract therefor in writing, and the tenancy was, therefore, one from month to month. (R. S. 1889, sec. 6371.) A notice for the termination of this tenancy was, during the momentary absence of the tenant, delivered by the landlord to one of the tenant's salesmen,

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who were, owing to the absence of their employer, temporarily in charge of the store, and who were in the habit of receiving all papers delivered there in the absence of. and for, their employer, and placing the same in a receptacle provided for that purpose. *Held*, that the salesman thus served was not the agent of the tenant for the purpose of the service of such notice within the meaning of the statute, and that, it not appearing that said notice reached the tenant in person, the service was insufficient.

2. ——— : ———. The statute providing for the service of such notice requires a personal service, at least in all cases wherein such service can conveniently be made.

Appeal from the St. Louis City Circuit Court.—Hon. Leroy B. Valliant, Judge.

Affirmed.

Frank Hicks, for appellant.

The person to whom the notice was given was a servant of the tenant, at the rented premises, in charge (with two other servants of equal rank and authority) of the tenant's business at that place, in the absence of the latter, with recognized and express authority from the tenant to receive papers left with him at such place for his master during the latter's absence; and such person, at the time of the service upon him, was in charge (with his fellow-servants) of the store, and received the notice for his master. Such facts constitute such person an agent of the tenant within the meaning of section 6731 of the statutes of 1889. *Walker v. Sharpe*, 103 Mass. 154; Wade on Notice, sec. 640; 1 Wood, Land & Ten., p. 121, sec. 41; Woodfall, Land. & Ten., sec. 353; 5 House of L. Cases, L. R. 561, where the English cases are reviewed. The statute is not exclusive with reference to the persons upon whom service may be made. Whether the person here served was an "agent" or not, his relations to the tenant and to the rented premises were such as to make service upon him sufficient. Cases cited, *supra; Beiler v. Devoll*, 40 Mo. App. 251.

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Montague Lyon, for respondent.

Rombauer, P. J.—The statute (sec. 6371) provides among other things, that "all contracts or agreements for the leasing, renting or occupation of stores * * * in cities * * * not made in writing, signed by the parties thereto, or their agent shall be held and taken to be tenancies from month to month, and all such tenancies may be terminated by either party thereto, or his agent, giving to the party or his agent one month's notice in writing of his intention to terminate such tenancy."

The defendant was, within the purview of this section, the plaintiff's tenant from month to month. More than one month preceding the first day of September, 1890, the plaintiff sent a written notice in terms as required by the statute to the premises let, being the defendant's store, which notice was there delivered to one of the defendant's salesmen, who, with other salesmen, was in temporary charge of the place, the defendant being in the city, and accessible, but having left the store to go to his dinner. It was shown in evidence that the salesmen in the store were in the habit of receiving all papers delivered there in the absence of their principal, and placing them in a receptacle provided for that purpose. It was, however, not shown that this particular notice ever reached the defendant himself at any time. The defendant refused to surrender possession at the time mentioned in the notice, whereupon the plaintiff, first making demand for the possession of the premises in writing, instituted the present action of unlawful detainer. Upon the trial, the above facts appearing, the court instructed the jury that the plaintiff could not recover. The plaintiff took a nonsuit, and, after an ineffectual attempt to set the same aside, brings the case here by appeal.

The error assigned is that the court erred in holding that the service of the notice to quit was insufficient,

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which ruling resulted in the nonsuit. The plaintiff's counsel contends that the service was sufficient both under the statute and at common law, and that the mode of service pointed out in the statute is not exclusive. The statute points out no mode of service at all. When the statute mentions an agent, it uses that term in the sense of designating the party on whom the service may be made, and not a party through whom the principal is to be notified. The principal may be a non-resident of the state, or otherwise beyond the reach of service, or it may be a corporation, or the principal may transact his business at the particular place through an agent who holds possession of the premises for his principal. In all these cases service upon an agent is sufficient, because *quo ad hoc* he is the representative of the principal and himself the proper party to be notified. The holding of the court, that in this case the salesman, who together with his fellow salesmen was in temporary control of the premises, was not the agent contemplated in the statute, was clearly correct, and, unless he was the proper person through whom the principal was to be notified, the principal was not notified at all, because there is no evidence that the principal received the notice.

We have repeatedly held that, where the statute requires service of a written notice, and no mode of service is provided for by law, the statute contemplates personal service. The statute in this case does not provide for the manner of service, and would require personal service, at least in all cases where such notice can conveniently be given. In *Beiler v. Devoll*, 40 Mo. App. 251, service of the notice upon the tenant's wife was held sufficient, but it does not appear whether the tenant himself was conveniently accessible to personal service. In *Clark v. Keliher*, 107 Mass. 406, service upon the wife was also held sufficient; there, however, it affirmatively appeared that the tenant was a traveling peddler, and his whereabouts were uncertain. So in

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Walker v. Sharpe, 103 Mass. 154, service of process upon the tenant's partner, while the tenant himself was out of the state, was held sufficient. Judge GRAY holding that the mode of service adopted, if not the only one practicable to the landlord, was clearly the most beneficial to the tenant, and must be held sufficient. But none of the American cases cited to us go to the extent of holding the service of a notice sufficient, which was neither personal, nor made upon a party upon whom, under the statute, the service of a summons would have been availing. Where a notice, as in this case, works a forfeiture or a termination of an estate, and there is nothing to show that personal service could not be conveniently had, the least that can be required of the plaintiff is to show that the notice was properly transmitted and reached the party to be affected, in time to amount to the thirty days' notice required by the statute. As the plaintiff has failed to do so in the case at bar, we must conclude that the court rightly instructed the jury that upon the case made she could not recover. All the judges concurring, the judgment is affirmed. So ordered.

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89	225
46	440

THE FIRST NATIONAL BANK OF CAMERON, Appellant, v. Z. T. STANLEY, Respondent.

Kansas City Court of Appeals, November 9, 1891.

1. **Bills and Notes**: FRAUD AS A DEFENSE: EVIDENCE IN RELATION TO OTHER NOTES. In an action on a negotiable promissory note by an indorsee, where the defense is fraud, evidence of controversies had, at about the time of the giving of the note in suit, between the payee and other parties about other notes, is inadmissible and its introduction necessarily harmful.

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2. ——— : ——— : EVIDENCE OF SIGNATURE OF FIRST INDORSEE TO LETTER. In an action on a negotiable note by the second indorsee where the defense is fraud, it is error to admit in evidence a letter of the first indorsee unconnected with the transaction, but admittedly signed by him for the purpose of permitting the jury to compare the signature thereon with the signature of another letter tending to show notice of the fraud on the part of the indorsee and purporting to have been written by him, which he denies; the rule now being that papers not a part of the case, and not relevant, as evidence to the other issues, are excluded.

3. ——— : SIGNING NOTE INSTEAD OF ANOTHER PAPER. Where one intends to bind himself by some obligation in writing and voluntarily signs his name to what he supposes to be the intended obligation, with full means of ascertaining the true character of the instrument before signing, but negligently or by misrepresentation of another signs and delivers a negotiable note in lieu of the instrument intended, he cannot be heard to impeach its validity in the hands of a *bona fide* holder.

4. ——— : ——— : INNOCENT HOLDER: NOTICE. Before an indorsee's title to a negotiable note can be impeached on account of notice of fraud, he must have actual notice of the facts which impeach the validity of the paper, and such circumstances as would likely arouse suspicion or put a prudent man on inquiry will not suffice.

5. ——— : ——— : BURDEN OF PROOF. The mere possession of an indorsed negotiable note imports *prima facie* that the holder acquired it *bona fide*; but, when the maker shows it had its origin in fraud, it is then incumbent on the holder to prove that he received it *bona fide* before maturity and for value.

6. ——— : ——— : GOOD FAITH OF FIRST INDORSEE. If the first indorsee in good faith and for value purchases a negotiable note before maturity, and subsequently assigns the same, then his indorsee acquires good title, although he at the time may have had notice of the fraud in the inception of the paper.

Appeal from the LaFayette Circuit Court.—HON. RICHARD FIELD, Judge.

REVERSED AND REMANDED.

Wallace & Chiles, *I. W. Whitsett* and *William Aull*, for appellant.

(1) The court below erred in the admission of illegal, irrelevant and incompetent evidence on the part

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of the defendant. *Merrick v. Phillips*, 58 Mo. 436; *Hamilton v. Marks*, 63 Mo. 167, at 175. Much of this evidence objected to is hearsay, and *inter alios acta*, so far as plaintiff is concerned, and all of it irrelevant and immaterial. *O'Neil v. Crain*, 67 Mo, 250; *Fongue v. Burgess*, 71 Mo. 389; 1 Greenl. Ev. [4 Ed.] secs. 171, 190; *State v. Whelehon*, 102 Mo. 17, at 23; *Shirts v. Overjohn*, 60 Mo. 305, at 310-311; *Woodard v. Spiller*, 1 Dana (Ky.) 180; 25 Am. Dec. 139. Witnesses to be qualified to testify by comparison of handwriting must be "experts." Swearing men on a jury does not transform them into "experts," as to handwriting. *State v. Owen*, 73 Mo. 440; *State v. Grant*, 74 Mo. 33; *State v. Hastings*, 53 N. H. 460; *Chance v. Railroad*, 32 Ind. 474; *Bragg v. Colwell*, 19 Ohio St. 413. Again, the letter adopted as the standard of comparison had no reference to the questions in issue nor connected therewith in this cause. *Smith v. Walton*, 8 Gill, 86; *Williams v. Drexel*, 14 Md. 566; *Tome v. Railroad*, 39 Md. 90-93; *Whiting v. Brunell*, 8 La. Ann. 429; *State v. Fritz*, 23 La. Ann. 55; *Clark v. Rhodes*, 2 Heisk. 206; *Hanley v. Gandy*, 28 Tex. 211; *Moore v. United States*, 91 U. S. 270; *State v. Clinton*, 67 Mo. 380, at 383-385; 1 Greenl. Ev. [4 Ed.] sec. 578; *State v. Scott*, 45 Mo. 302, at 305; *Hicks v. Person*, 19 Ohio, 426; *Doe v. Newton*, 5 Ad. & E. 514; *Van Wyck v. McIntosh*, 14 N. Y. 442; *Dubois v. Baker*, 30 N. Y. 355; *Bank v. Mudget*, 44 N. Y. 524; *Randolph v. Laughlin*, 48 N.Y. 459; *Goodyear v. Vosbargh*, 63 Barb. 156; *Impertz v. People*, 21 Ill. 375; *Kernin v. Hill*, 37 Ill. 209. The court below erred in refusing instructions, numbered 2, 4 and 8, as asked for by plaintiff, and erred in modifying and changing such instructions. These instructions as asked enunciate correct principles of law applicable to the case, and hypothecate sufficient facts to authorize a finding thereon for plaintiff, and should have been given. *Funkhouser v. Lay*, 78 Mo. 465, and cases cited;

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Crow v. Alexander, 24 Mo. App. 164; *Craig v. Zimmerman*, 87 Mo. 475. (3) The court below manifestly erred in refusing to give to the jury the instruction, numbered 3, asked for by plaintiff. *Hamilton v. Marks*, 63 Mo. 167, at 175, 178, and cases cited; *Goodman v. Harvey*, 4 Ad. & El. 870. The doctrine of *Gill v. Cabit*, 3 B. & C. 466, and that of *Hamilton v. Marks*, 52 Mo. 78, has been repeatedly overruled, and long since exploded. *Edwards v. Thomas*, 63 Mo. 467, at 483, point 3; *Goodman v. Simmons*, 20 How. (U. S.) 343; *Bank v. Neal*, 22 How. 96; *Murry v. Lordner*, 2 Wall. 110; *Magee v. Badger*, 34 N. Y. 247; *Bank v. Hoge*, 35 N. Y. 56; *Seyvel v. Bank*, 54 N. Y. 288; *Phelan v. Moss*, 67 Penn. St. 59; *Lake v. Reed*, 29 Iowa, 258; *Johnson v. Murray*, 72 Mo. 278; *Bank v. Stoneware Co.*, 4 Mo. App. 276, at 282-3; *Pana v. Bowler*, 107 U. S. 529, at 541-543. (4) Possession of the note by plaintiff was *prima facie* evidence that he had acquired it in good faith for value in the usual course of business. *Grelle v. Loxen*, 7 Mo. App. 97, at 98; *Bank v. Stoneware Co.*, *supra*; *Shirts v. Overjohn*, 60 Mo. 305. (5) The court below manifestly erred in giving to the jury the instruction, numbered 1, on the part of defendant. This instruction, in words and in effect, tells the jury that the note in issue was "fraudulently obtained" by Eberle, if obtained "by representing that it was a contract for medical services and medicines that defendant was signing," without a particle of evidence of "any physical obstacle to the defendant's reading the paper before he signed it," and his own testimony showing that "he understood that he was signing a paper by which he was about to incur an obligation of some sort, and he abstained from reading it." *Shirts v. Overjohn*, 60 Mo. 310-311, and cases cited; *Chapman v. Rose*, 56 N. Y. 137; *Hamilton v. Marks*, 63 Mo., *supra*, 175-178. (6) The court below erred in giving to the jury the instruction, numbered 3, on behalf of defendant. Authorities, *supra*.

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John S. Blackwell and *J. D. Shewalter*, for respondent.

(1) The evidence of Proctor, as to the occurrences at his hotel, was competent. *First.* It tended to show the nature and character of Eberle's business, and, hence the fraudulent character of the note in suit. *Second.* It showed the time he left Odessa the night of the twenty-second. *Third.* An account thereof was published; Bohart saw it; whether before or after his alleged purchase was for the jury. (2) The testimony of James Buchanan, as to his note, was competent, since it was dated September 3. Bohart testified he saw the account of Eberle's *modus operandi* after buying the Stanley note, and he never bought another note after that, yet the Buchanan note bore his indorsement, and was sent by him or his son for collection. (3) The letter sending the Buchanan note for collection, being signed by W. H. Bohart, and he having sworn it was written and signed by his son in his name and he had authority to sign his name, it was proper for the jury to examine the same, and compare it with other writings of W. H. Bohart. (4) There was no error in the instructions; the law of the case is simple, yet plaintiff asked and obtained a number with slight modification. If the note was fraudulent, yet if Bohart was a purchaser for value before maturity without notice the plaintiff was entitled to recover. The court declares the law; it is supposed the jury will be governed by the law, and, though often given, it is not necessary to tell them expressly to find a verdict for plaintiff, as asked, if they believed, from the evidence, so and so. But in this case the instructions did as asked more; they were not hypothetically put, but were peremptory declarations as a matter of law, to find for plaintiff. They declare, "and the jury will find, for the plaintiff." The second declared if the plaintiff obtained the note before maturity in the usual course of business,

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etc. There was no evidence on which to base this. The instruction substitutes the plaintiff for Bohart. The plaintiff did not so secure the note—it was the mere successor of Bohart, or the Cameron Bank. (5) An examination of the evidence leaves no doubt that Eberle was a confidence man, and that the "innocent purchaser" who buys notes on parties in LaFayette county from a stranger (?) was fully cognizant of his character.

Gill, J.—This is an action on a promissory note, negotiable in form, for $175, executed by defendant on August 22, 1889, and payable to H. A. Eberle, M. D., on or before April 22, 1890. Plaintiff's title to the note comes by virtue of an alleged assignment from Eberle to Bohart and Bohart to it, all made as it is claimed for value in good faith and before maturity. The defense rests upon a claim of a fraud practiced on defendant Stanley by Eberle; that said Eberle at the date of the note came to the defendant at his farm in LaFayette county, and negotiated with defendant in reference to curing him and his wife of certain ailments. Terms for an assured cure were agreed upon, and a contract was produced which defendant says was to be signed in duplicate, the one to be signed by Eberle and retained by Stanley. and the other to be signed by defendant and held by said Eberle. Defendant admits the signature to the note in suit, but says he signed the same under the belief that it was the duplicate copy of the contract. However this may be, Bohart claims that when he purchased the instrument he had no notice or knowledge of the alleged fraud, and that any fraud in its execution cannot be used to impeach his, or the plaintiff's, title. At the trial in the circuit court before a jury evidence was adduced on the part of defendant tending to prove Eberle's fraud in securing the note, and that Bohart had notice thereof when he purchased the same, while the evidence on the part of plaintiff tended to establish the

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contrary. A verdict and judgment was had for defendant and plaintiff appealed.

I. The errors, manifest in this record, are such that the judgment cannot stand. We proceed to notice the more serious of these. First, as to the evidence in the case: Proctor, a hotel keeper at Odessa, Missouri, was permitted, over plaintiff's objection, to relate to the jury what occurred at his house near the date of this note, when and where it seems that other parties had some violent talk with Eberle in relation to other notes; that Eberle became frightened and fled the hotel in the night-time, etc. It is difficult to comprehend upon what theory this testimony was admitted. Any controversy that Eberle may have had with others had no possible bearing on the issues of this case. There was no connection shown or pretended between the two acts. The introduction of such evidence could only serve to inflame and prejudice the minds of the jury. Permitting such evidence was clearly error, and almost necessarily harmful, too.

Again the defendant produced at the trial a letter purporting to be written by Bohart. He denied its execution, but said his son wrote the letter and signed his name. Now (for the purpose, I suppose, of contradicting Bohart and to show that he, in person, wrote the signature) defendant's counsel called his, Bohart's, attention to another letter written by said Bohart to Charles H. Pool, and he, Bohart, admitted the signature thereto to be his. Thereupon the court permitted the jury to take the two letters (the one confessed and the one denied) and compare the signatures, with the view of determining whether or not said Bohart wrote the disputed signature. This was also an error. The Pool letter had nothing whatever to do with the case; its contents were wholly foreign to every issue then being tried. The rule in this state seems now well settled, that "papers not a part of the case, and not relevant, as evidence, to the other issues, are excluded, and mainly

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on the grounds that, to admit such documents, would lead to an indefinite number of collateral issues," etc. A standard of comparison cannot thus be established in an issue of *non est factum*. *Rose v. Bank*, 91 Mo. 399; *Edmonston v. Herring*, 44 Mo. App.

II. Neither do we feel satisfied with the court's action in regard to instructions. There are two theories for the defense to this action, and it is not entirely clear which was relied on. If the defendant while exercising due and proper care was yet by the fraud and artifice and deceit of Eberle induced to sign the note in question, when he thought he was executing another and different paper, then it would seem the plaintiff could not recover, regardless of its *bona fides* or want of notice. *Shirts v. Overjohn*, 60 Mo. 305; *Frederick v. Clemens*, 60 Mo. 315; *Cannon v. Moore*, 17 Mo. App. 92; 1 Dan. Neg. Inst., sec. 849, 850. However, the courts have exacted a rather high degree of care on a party signing a negotiable promissory note under the belief that he was affixing his name to another instrument. In *Shirts v. Overjohn*, *supra*, the rule gathered from the best-considered cases is said to be, "that where it appears that the party sought to be charged intended to bind himself by some obligation in writing, and voluntarily signed his name to what he supposed to be the obligation he intended to execute, having full and unrestricted means of ascertaining for himself the true character of such instrument before signing the same, but by the failure to inform himself of its contents, or by relying upon the representations of another as to the contents of the instrument presented for his signature, signed and delivered a negotiable note in lieu of the instrument intended to be signed, he cannot be heard to impeach its validity in the hands of a *bona fide* holder." In defending then such a note in the hands of an innocent holder, purchased for value before maturity, it is not enough to prove merely a signing the wrong paper by mistake or inadvertence, or

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even that the character of the obligation was misrepresented by another. The law respects too highly the character of commercial paper, as well as the rights of the holder thereof, to permit such a defense in the hands of an innocent third party. The courts give full scope to the rule, that, if one of two innocent parties must suffer, the loss will be visited upon him whose negligence has brought it about. Now, it is clear from defendant's own statement that he was not sufficiently careful when signing this note. He evidently relied upon Eberle's statement without investigating for himself. He will not be permitted to shut his eyes and blindly put his name to a negotiable note, send it out to the world, and then defend a suit brought thereon by a *bona fide* holder on the grounds that he did not mean to put his name to that kind of an obligation. As we read the evidence brought up in this record, then, we find no ground for a defense on this note, if in the hands of a *bona fide* holder.

The only way to defeat this suit is, *first*, to establish Eberle's fraud in procuring the note, and, then, by showing Bohart's knowledge thereof at the time of the purchase, destroy plaintiff's position as an innocent holder. If this is done, then the same defense can be made against the plaintiff as if the suit was prosecuted by Eberle, the payee. It is not enough however that Bohart may have purchased the note from Eberle under such circumstances as would likely arouse suspicion as to the integrity of the note, or that Bohart bought under such circumstances as would put a prudent man on inquiry; but before his title can be impeached on this account, he must have had actual notice of the facts which impeach the validity of the paper. *Hamilton v. Marks*, 63 Mo. 167; *Mayes v. Robinson*, 93 Mo. 122. Plaintiff's third instruction correctly declared this feature of the law. It seems doubtful, however, if the last clause of that instruction has any place in this case. It declares that the burden of showing Bohart's bad faith in the purchase of

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the note rests with the defendant. It is true that the mere possession of a negotiable instrument indorsed by the payee imports, *prima facie*, that the holder acquired it *bona fide*, for value, before maturity, and without notice of any facts impeaching its validity. "But when the maker proves that the instrument had its origin in fraud, it is incumbent then upon the holder to prove that he received it *bona fide*, before maturity, and for value." *Johnson v. McMurray*, 72 Mo. 282. Again, if Bohart, in good faith and for value, purchased from Eberle the note in suit before maturity, and if said Bohart subsequently assigned the same to the plaintiff bank, then plaintiff acquired the same title possessed by Bohart, even though the bank at the time of the purchase may have then had notice of Eberle's fraud in procuring the note. *Craig v. Zimmermun*, 87 Mo. 478. Hence plaintiff's instruction, numbered 8, should have been given, since it correctly declares this feature of the law.

Judgment reversed and cause remanded. All concur.

WILLIAM M. FIELD, Respondent, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant. 46 449 / 95 735

Kansas City Court of Appeals, November 9, 1891.

Practice, Trial: DEMURRER TO EVIDENCE. In passing upon a demurrer to the evidence the court should make every inference of fact in favor of the party offering the evidence which the evidence warrants, and which a jury might with any degree of propriety have inferred; the evidence in this case is reviewed and *held* sufficient to be submitted to the jury.

Appeal from the Saline Circuit Court.—HON. RICHARD FIELD, Judge.

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AFFIRMED.

W. S. Shirk, for appellant.

The demurrer to the evidence should have been snstained.

Chas. M. Hawley, for respondent.

The court did not err in overruling defendant's demurrer to the evidence. *Wilson v. Board of Ed.* 63 Mo. 137; *Brink v. Railroad*, 17 Mo. App. 177; *Fisher v. Railroad*, 23 Mo. App. 291; *Noeninger v. Vogt*, 88 Mo. 589; *Buesching v. Gaslight Co.*, 73 Mo. 219; *Feurt v. Brown*, 23 Mo. App. 332; *Baum v. Fryrear*, 85 Mo. 151; *Groll v. Tower*, 85 Mo. 249; *Sage v. Reeves*, 17 Mo. App. 210; *Williamson v. Fisher*, 50 Mo. 198; *Moody v. Deutch*, 85 Mo. 237; *Covey v. Railroad*, 86 Mo. 635.

SMITH, P. J.—This was an action begun before a justice of the peace, under section 2611, Revised Statutes, for the recovery of damages for the killing of a cow and calf. The plaintiff had judgment, and defendant appealed.

The defendant contends that the demurrer, interposed by it to the evidence, should have been sustained for the reason that there was no evidence whatever of either of the following facts: *First*. That defendant owned or operated the railroad by the side of which plaintiff's cow and heifer were found dead. *Second*. That the defendant ever run a single locomotive or train of cars over said railroad. *Third*. That either the cow or heifer were struck and killed by a locomotive or train of cars, or that a train of cars had passed over the road at the place where the stock was found for a week, a month or a year before. *Fourth*. That the cow or heifer got onto the railroad right of way at a point where the railroad was not fenced.

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Before proceeding to the consideration of the grounds upon which defendant seeks to impeach the judgment, we may remark, that, in passing upon a demurrer, we will make every inference of fact in favor of the party offering the evidence which the evidence warrants, and which the jury might with any degree of propriety have inferred. This rule is too well established in this state to require a reference to the adjudged cases.

As to the first ground we may say that the evidence tended to show that defendant's section boss, Jennings, notified plaintiff that his stock had been injured on its roadway; "that it was killed on defendant's road by a train going east;" that it was defendant's night trains that generally killed the stock on the road; that the defendant's section boss requested persons to come and appraise the plaintiff's injured stock; that the defendant appeared by its attorney before the justice of the peace and took the appeal, which we think furnish a sufficient basis to support the inference that the defendant at least operated the railroad by the side of which the plaintiff's stock was found injured. This evidence together with the further evidence as to the place where the plaintiff's stock was found, the physical appearance of the track there and the nature of the injury to the stock, justifies the inference that the defendant ran its locomotives and trains of cars over said railroad at the point where the plaintiff's stock was injured.

As to the fourth point, it is to be observed that there is no pretense that the defendant's right of way where it runs through the plaintiff's farm was fenced on the switch side. The plaintiff's pasture lies on the south side of defendant's right of way, and is uninclosed only on that side. The plaintiff's cow was left in the pasture on the night of the injury, because of a rain falling on the preceding evening, and undoubtedly she escaped from there onto defendant's track where she was struck and injured by a passing train. The calf ran, too, in the same pasture up to the time it strayed

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upon the defendant's right of way. The plaintiff offered no direct and positive evidence that his stock strayed upon the defendant's unfenced right of way from his pasture lying on the south side of it, but the evidence adduced did furnish strong circumstances from which the jury might have reasonably inferred that such was the fact. *Walther v. Railroad*, 78 Mo. 617; *Fickle v. Railroad*, 54 Mo. 219; *Walther v. Railroad*, 55 Mo. 271. In short, it is impossible to read the evidence in the case without reaching the conclusion that there is no merit in the defense. The record is wholly barren of error, and the judgment will be affirmed. All concur.

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WILLIAM C. LEMON, Respondent, v. JAMES H. LLOYD, Appellant.

Kansas City Court of Appeals, November 9, 1891.

1. **Principal and Agent:** COMMISSION FOR SALE OF REAL ESTATE. If a real-estate agent procures a purchaser ready, willing and financially able to make the purchase absolutely on the terms fixed by the principal, and the latter accepts the buyer and enters into a contract with him respecting the sale and purchase of the property, he establishes a *prima facie* right to his commissions.

2. **Justices' Courts:** SUFFICIENCY OF STATEMENT. In actions before justices of the peace, a statement is sufficient, if it advise the defendant of what he is sued for, and is so definite as to bar an action for the same matter.

3. ——— : CONSTRUCTION OF STATUTE : EVERY LITIGANT HIS OWN LAWYER. The statute governing practice and proceedings in justices' courts should be construed so as to make it possible for any plain, common-sense citizen to appear there and prosecute or defend an ordinary action.

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4. ——— : ACCOUNT : CONTRACT : QUANTUM MERUIT. In a suit in a justice's court on an account for services of any kind, it is sufficient proof to authorize a recovery, if it be shown the services were rendered under a special contract to pay so much per day, week or month, or a specific sum for the entire service; or, failing in that, even if it only appear there was a contract of employment, but none as to compensation, still the plaintiff ought to be permitted to recover, if he shows by evidence what such services were reasonably worth.

5. **Practice, Trial:** CONTRACT: QUANTUM MERUIT: INSTRUCTIONS. Where, on the trial in the circuit court of an action instituted before a justice of the peace, there are instructions on the theory of a special contract, and the jury found for the plaintiff on such theory, no injury resulted to the defendant from giving an instruction on the theory of a *quantum meruit*, there being no evidence of the reasonable value for the services sued for.

6. **Principal and Agent:** EVIDENCE: AGENT GIVING PURCHASER PART OF COMMISSION NO DEFENSE. The fact that the agent agreed to give the purchaser a part of his commissions if he would close the trade cannot injure the principal, and is not admissible in evidence to defeat an action for the agent's commissions.

7. ——— : COMMISSIONS : EVIDENCE : PERFECTING TITLE : DEFENSE. The mere fact, that the purchaser produced by the agent at the time of making the contract of purchase knew that there were some proceedings in the probate court required to perfect the title, is not admissible in evidence, unless followed by the further offer to show what the proceedings were and the time required to secure them, so that the jury could determine whether defendant had perfected the title in a reasonable time; and such fact cannot defeat the agent's action for his commissions, where the purchaser produced was able and willing and was accepted and contracted with by the principal.

Appeal from the Clay Circuit Court.—HON. JAMES M. SANDUSKY, Judge.

AFFIRMED.

Burris & Lawson, for appellant.

(1) The first instruction given for plaintiff is bad, for the reason that, upon the finding of the facts therein set out, the jury were instructed to find for plaintiff; it attempts to set out the whole case, but ignores the fact of the agreement made after ten days had expired, and

leaves out the element of readiness on the part of the purchaser to pay cash. These omissions are not supplied by any subsequent instructions. *Straus v. Railroad*, 86 Mo. 421; *Owens v. Railroad*, 95 Mo. 169; *Sullivan v. Railroad*, 88 Mo. 169; *Thomas v. Babb*, 45 Mo. 384. (2) The second instruction given for plaintiff is bad, because it is based upon the facts set out in the first. (3) The third instruction given for plaintiff is bad, because it ignores the element of ability on the part of the purchaser to pay cash. (4) The fourth instruction given for plaintiff is bad, for the reason that this action was for "agreed commissions." Under such a statement the plaintiff could not recover on a *quantum meruit*. (5) Because plaintiff admits that out of the $250 commission Messick, the purchaser, was to receive $100, and this arrangement was unknown to defendant. Such an agreement was *contra bonos mores*. It was the duty of plaintiff to acquaint the defendant with the proposed division of commissions, and in failing to do this he did not observe the *uberrima fides* which the law exacts from an agent towards his principal. *Dearing v. Sears*, 3 N. Y. Supp. 31; *Murray v. Beard*, 102 N. Y. 505–508; *Scribner v. Collar*, 40 Mich. 375; *Bell v. McConnell*, 37 Ohio St. 396; *Webb v. Paxton*, 32 N.W. Rep. 749; *Raisin v. Clark*, 41 Md. 158; *Rice v. Wood*, 113 Mass. 133; *Lynch v. Fallon*, 11 R. I. 311. (6) The court erred in refusing to allow defendant to show by witness Messick that he, Messick, knew that it would require some proceedings in the probate court to perfect the title, inasmuch as the plaintiff had already testified that he had understood that there was some trouble about the title. The defendant was entitled to a reasonable time in which to perfect the title. *Dent v. Powell*, 45 N. W. Rep. 772.

John Dougherty and *Geo. F. Isgrig*, for respondent.

(1) The instructions given by the court on behalf of both plaintiff and defendant are, practically, without

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exception, a concise and sufficiently comprehensive statement of the law governing the issues of this case. (2) Plaintiff, being duly authorized as agent of defendant to sell certain real estate presented to his principal a buyer who was ready, able and willing to purchase the same; and, a valid and binding contract being entered into between such purchaser and seller, the broker has thereupon discharged his obligation to the seller, and, unless the owner and broker had agreed to the contrary, the broker's commission became due and payable upon the execution of such contract. (3) An agent's willingness to sacrifice a portion of his commission as an inducement to a buyer to purchase his principal's property, which he desires to sell, evidences not bad faith, legal fraud or treachery on the part of such agent, but, on the contrary, the most profound fidelity to the best interests of his principal. *Nesbitt v. Hesler*, 49 Mo. 383; *Coleman v. Meade*, 13 Bush. 358; Fitch on Real Estate, p. 141; *Collins v. Fowler*, 8 Mo. App. 588.

Smith, P. J.—This was an action commenced before a justice of the peace by plaintiff against defendant to recover $250 as commission for making the sale of certain real estate for defendant. The plaintiff had judgment in the circuit court for the amount sued for, from which judgment defendant appealed.

I. The appealing defendant questions the judgment upon a number of grounds. The objections which the defendant has lodged against the first, second and third instructions given by the court, on its own motion, for the plaintiff, are without force. These instructions were predicated upon evidence which was ample to warrant the action of the court in giving them. No valid objection is perceived to the hypothesis of either of them. The plaintiff's evidence showed that he not only produced a buyer who was ready, willing and financially able to make the purchase absolutely on the terms fixed by defendant, but

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that the defendant accepted the buyer and entered into a contract with him respecting the sale and purchase of the property The introduction of evidence tending to establish these facts *prima facie* entitled the plaintiff to recover. *Zeidler v. Walker*, 41 Mo. App. 118; *Hayden v. Grillo*, 26 Mo. App. 289; *Love v. Owens*, 31 Mo. App. 501; *Millan & Abbott v. Porter*, 31 Mo. App. 563. If the defendant's terms had been ready cash and the purchaser found had accepted the same, but was unable financially to meet this condition, then this would have been a proper element of fact for the consideration of the jury. But the undisputed evidence was that the purchaser was a man of considerable means, and abundantly able to pay the ready cash when the defendant should perform the condition precedent required by the contract.

II. The defendant's further contention is, that the action was on a special contract, while the fourth instruction given for the plaintiff authorizes a recovery on a *quantum meruit*. It is proper to remark that in actions before the justice of the peace a statement is sufficient if it advise the defendant of what he is sued for, and is so definite as to bar another action for the same matter. *Butts v. Phelps*, 79 Mo. 302; *Fleischman v. Miller*, 38 Mo. App. 177; *Gregg v. Dunn*, 38 Mo. App. 283. Justice courts were created no doubt upon the idea that ordinarily every litigant therein could be his own lawyer. In these inferior, though useful, courts it was never the design of the legislature that a lawyer should be indispensable in the trial of causes there. The statute governing the practice and proceedings in these courts should be construed so as to make it possible for any plain, common-sense citizen to there appear and prosecute or defend an ordinary action. No pleadings beyond what has been already indicated or required. Hence, in a suit on an account for work and labor or services of any kind, it is sufficient proof of the account to entitle the plaintiff to recover if it be shown

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the work and labor done or services rendered were under a special contract to pay so much per day, week or month, or a specific sum for the entire service; or, failing in that, if it appear that there was a contract of employment, but none as to compensation,—still the plaintiff ought to be permitted to recover if he shows by evidence what such services were reasonably worth.

Hence, too, in a suit on an open account this practice before justices' courts should obtain without reference to the wording of the account, beyond what has already been stated. This broad and practical construction of the statute, referred to, would, in our opinion, enlarge the usefulness of these courts and give effect to the legislative intent in providing for their creation. But if in a suit before a justice of the peace on an open account for services of any kind, when the language of the account states that the compensation was fixed by contract, there can be no recovery even on a *quantum meruit*, if it turns out on the trial that there was no contract fixing the compensation; still it is not believed that this would better the defendant's plight. The instructions authorizing the jury to find for the plaintiff on a *quantum meruit* were without evidence to support them. There was no evidence as to the reasonable value of the plaintiff's services. So that the jury must have found for the plaintiff on the contract theory embraced in plaintiff's first instruction. The instruction authorizing a recovery on a *quantum meruit*, if erroneous as defendant contends, was disregarded by the jury as we have seen, so that no injury resulted to the defendant in consequence thereof.

III. Nor do we find that there was any error in the refusal of the trial court to permit the defendant to show that the plaintiff had agreed with the purchaser, Messick, that, if he would close the lot trade with defendant that plaintiff would give him, Messick, $100 out of his commission. The plaintiff had found a purchaser who was willing and able to pay defendant what

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he asked for his property, and if plaintiff chose to give a part or all of his commission for making the sale to the purchaser, Messick, it is quite difficult to understand how that could injure defendant in any way. There is nothing in the morals or in the law that forbids conduct of this kind on the part of an agent. The conduct of the plaintiff is not condemned by the rule in respect to dual agency. *Huggins, etc., v. Ins. Co.*, 41 Mo. App. 530; *Reese v. Garth*, 36 Mo. App. 641.

IV. The trial court did not err in refusing to permit the defendant to show that at the time of the execution of the contract with Messick, that the latter knew that there was an outstanding interest in the property, which would require some proceedings in the probate court in respect thereto before that interest could be conveyed to him. This offer did not go far enough. It should have also shown facts as to the acts to be done, and the time required to do those acts, to have enabled the jury to determine whether the defendant had perfected the title within a reasonable time. But the proposal made was so restricted as to render what it embraced immaterial. Besides this, the jury having found the facts to be as included in the hypothesis of the first instruction for the plaintiff, the time the defendant, under the contract with Messick, was entitled to have in perfecting his title was unimportant, since it did not affect the plaintiff's right to recover of the defendant his commission for making the sale.

The evidence shows that the plaintiff was entitled to recover, and that the judgment is manifestly for the right party. No errors are assigned materially affecting the merits of the action, so that it follows the judgment of the circuit court must be affirmed. All concur.

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THE CITY OF PLATTSBURG, Respondent, v. JOHN A. TRIMBLE, Appellant.

Kansas City Court of Appeals, November 9, 1891.

1. **Municipal Corporations:** CITY OF THE FOURTH CLASS: POWER TO REGULATE BILLIARDS: MINORS. A city of the fourth class has power to regulate billiard tables and to inflict a penalty upon the keeper of such table for permitting minors to play thereon without the consent of their parents.

2. ———: ORDINANCE PROHIBITING MISDEMEANOR: VIOLATION: PROCEDURE. Municipal corporations may, by ordinance, prohibit acts which are made misdemeanors under the general statutes of the state, and, for violation of such ordinances, may maintain a proceeding in its own name to impose and collect a fine.

3. **Appellate Practice:** NO EVIDENCE: CIRCUMSTANCES: DEFERRING TO TRIAL JUDGE. While all the oral evidence may be inconsistent with defendant's guilt, yet, if circumstances tended strongly to support the trial court's finding, the appellate court will defer to such finding.

Appeal from the Clinton Circuit Court.—HON. JAS. M. SANDUSKY, Judge.

AFFIRMED.

F. B. Ellis, for appellant.

(1) There is no power given municipal corporations to regulate billiard and pool tables, except by a license tax. *Knox City v. Thompson*, 19 Mo. App. 523. (2) Their ordinances must be in conformity to the state law. There is no law in this state to punish the keeper of a billiard table for permitting minors to play on such tables. The punishment prescribed is by civil action. Then this must be prosecuted by civil action. 1 R. S., sec. 715; *City of Linneus v. Dusky*, 19 Mo. App. 20. (3) Where there is no proof of an allegation, then it is the duty of the court to acquit. *State v. Warener*,

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74 Mo. 83; *State v. Brosius*, 39 Mo. 535; *State v. Arnold*, 55 Mo. 89. (4) The only tax authorized by plaintiff to be collected by its charter is a license tax. Ordinances which are penal in their nature must be strictly construed. This ordinance of plaintiff is penal in its nature; it being a city of the fourth class, under the Revised Statutes of 1889, relating to cities of this class, its powers cannot be enlarged or varied. 2 Dillon's Mun. Corp. [3 Ed.] sec. 781.

M. B. Riley, for respondent.

(1) Cities of the fourth class have power to pass such an ordinance as that under review. R. S. 1889, sec. 1589; Dillon, Munic. Corp. [3 Ed.] sec. 141; 96 Mo. 618. (2) Section 3 of the ordinance in question is in the nature of a police regulation, and its manner of enforcement is governed by the statutes. R. S. 1889, secs. 1589, 1635, 1638, 1643; Dillon, Munic. Corp. [3 Ed.] sec. 339.

Gill, J.—Plattsburg is a city of the fourth class. Among the ordinances for its government is found one for licensing and regulating billiard tables. Section 3 of this ordinance reads as follows: "Sec. 3. No person licensed under the provision of this ordinance shall suffer anyone under the age of twenty-one years to play on any table kept by him, without the written permission of the father, master or guardian of such minor first granted. Any person violating the provisions of this ordinance shall, on conviction, be fined not less than $50 for each offense." Defendant Trimble was successfully prosecuted for a violation of this ordinance, in that, being the proprietor of a licensed billiard table in the city of Plattsburg, he suffered the seventeen-year-old son of one Trice to play at the game of billiards thereon, without the permission of the boy's father. On a trial before the circuit court, without a

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jury, the defendant was found guilty; his fine placed at $50, and defendant appealed.

I. To reverse the judgment, two reasons are suggested: *First*. It is contended that the city of Plattsburg had no authority to pass such an ordinance; and, *second*, even admitting the legality of the ordinance, it is claimed that the evidence did not warrant the conviction.

As to the want of power in the plaintiff to adopt the ordinance, we think the question is scarcely debatable. We hold that Plattsburg, under its organic law, had the power. The rule is undisputed, as defendant's counsel states, "that a municipal corporation possesses and can exercise the following powers and no others: *First*, those granted in express words; *second*, those necessarily and fairly implied in or incident to the powers expressly granted; *third*, those essential to the declared objects and purposes of the corporation." 1 Dillon, Mun. Corp. [4 Ed.] sec. 89. Now the legislature of Missouri has granted to the cities of the fourth class (to which the city of Plattsburg belongs) "the power by ordinance * * * to regulate, and to levy and collect a license tax on * * * billiard tables, etc. * * * and to pass such other ordinances, for the regulation and police of said city as they shall deem necessary," etc. R. S. 1889, sec. 1589. The section of the ordinance before quoted is clearly a regulation as "to the mode in which the designated employment shall be exercised." *St. Louis v. Tel. Co.*, 96 Mo. 631.

It is no objection to the ordinance that the state may have likewise provided for the punishment of the same offense. It is well settled, says BLACK, J., in *St. Louis v. Schoenbusch*, 95 Mo. 621, that municipal corporations may by ordinance prohibit acts which are made misdemeanors under the general statutes of the state, and for a violation of such ordinances the city may maintain a proceeding in its own name to impose and

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collect a fine. The ordinance must be in harmony with the general statute, but there is here no conflict whatever. *City of Linneus v. Dusky*, 19 Mo. App. 20; *City of St. Louis v. Cafferata*, 24 Mo. 94; *City of St. Louis v. Bentz*, 11 Mo. 61.

As to the second point made, to-wit, that there was not evidence sufficient upon which to found a conviction, we have to say briefly, that, while the *oral* evidence adduced may have been quite all inconsistent with defendant's guilt, yet there were *circumstances* which tended strongly to support the court's finding. We must, on this finding of fact, defer to the trial judge. He was present, saw the witness and heard him testify, and is, therefore, better qualified than we to determine where the truth was. Judgment affirmed. All concur.

AMOS BANISTER, Administrator, Respondent, v. THOMAS KENTON, Appellant.

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Kansas City Court of Appeals, November 9, 1891.

Bills and Notes: COLLATERAL SECURITIES: PAYMENT OF SECURED DEBT: NO DEFENSE: INDORSEMENT: OWNER. K. gave his promissory note to N. who indorsed it to B. to secure him as N.'s indorser at bank. After B.'s death his administrator brought suit against K. the maker. *Held*:—

(1) The payment of the note at bank by N. did not show a failure of consideration so as to constitute a defense.

(2) Such payment only had the operative effect to reinvest the equitable title in N. leaving the naked legal title in plaintiff.

(3) That N.'s indorsement was *prima facie* evidence of ownership in plaintiff subject to all defenses against the real owner.

(4) That the maker cannot interpose the want of consideration for the transfer as a defense to the suit of the indorsee.

(5) That such want of consideration is a good defense only in an action between the indorsee and his immediate indorser.

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Appeal from the Ray Circuit Court.—HON. JAMES M. SANDUSKY, Judge.

AFFIRMED.

T. N. Lavelock, for appellant.

(1) All actions must be prosecuted in the name of the real party in interest, except suits instituted by administrators, executors, trustees or persons expressly authorized by statute. R. S. 1889, secs. 1990, 1991; *Grocery Co. v. Crow*, 36 Mo. App. 293. (2) One receiving negotiable paper, as collateral security for indemnity, is not necessarily a holder for value. Tiedeman on Com. Paper, sec. 168, p. 275, and cases cited; Jones on Pledges, sec. 117, p. 85, and cases cited; *Goodman v. Simmons*, 19 Mo. 106; *Branard v. Reaves*, 2 Mo. App. 490; *Conrad v. Fisher*, 37 Mo. App. 416, 417. (3) Parol evidence is admissible to show that a note transferred by indorsement was only intended as collateral. Jones on Pledges, sec. 82, p. 55, and cases cited; *Woods v. Matthews*, 73 Mo. 477; *Orrick v. Turner*, 26 Mo. App. 37. (4) The payment of the principal's debt by the surety is a condition precedent to the right of a surety to enforce payment of a collateral note deposited with him as an indemnity against loss by reason of becoming such surety. Until the surety has suffered loss he has no right of action. Colebrooke on Collateral Secnrity, secs. 225–228, and cases cited; *Hearne v. Keath*, 63 Mo. 84. (5) The payment of the debt by the principal discharges the collateral given as indemnity to a surety. Jones on Pledges, secs. 540, 544, pp. 420, 423, and cases cited; Colebrooke on Collateral Security, sec. 129, p. 165, and cases cited; *Grant v. Kidwell*, 30 Mo. 455; *Moynahan v. Moore*, 77 Am. Dec. 489, 491, and note; *Bryson v. Rayner*, 90 Am. Dec. 69, and note; *Loughborough v. McNevin*, 5 Am. St. Rep. 435. (6) The right and title of the pledgee to the collateral is entirely extinguished by the payment or valid tender of

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the principal debt by the pledgor. Jones on Pledges, secs. 540, 545, pp. 420, 423; Colebrooke on Collateral Security, sec. 129, p. 165; *Lapping v. Duffey*, 65 Ind. 229; *Grant v. Kidwell*, *supra*; *Norton v. Baxter*, 16 Am. St. Rep. 679.

James L. Farris, Jr., and *John F. Morton*, for respondent.

Where the instrument is supported by a consideration, as this is admitted to be, it is no defense by indorsee against the maker, the drawer, the acceptor or any prior indorser that the plaintiff is not a holder for value; the want of consideration for the transfer by indorsement is a good defense only in an action by the indorsee against his immediate indorser. Tiedeman on Com. Paper, sec. 154, p. 251, and cases cited, note 3. The consideration for the transfer of a note is not subject to inquiry, where no defense, arising out of transactions between the parties to the note, is sought to be made. *Million v. Ohnsorg*, 10 Mo. App. 432.

Smith, P. J.—This was a suit upon a promissory note brought before a justice of the peace. In the circuit court the plaintiff had judgment and the defendant appealed. It appears from the record that the defendant executed the note sued on to Neville who assigned it by his indorsement thereon to J. T. Banister to secure the latter against a contingent liability, *i. e.* becoming the security of the former on a note to the bank. While these parties were thus related in respect to the transaction, Banister died, and the plaintiff was appointed his administrator. After the death of Banister, Neville paid his note to the bank.

The administrator, finding the note of Kenton amongst the assets of his decedent's estate, brought this suit on it. The question which we are now to decide is, whether or not the defendant, who is the maker of the

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note, can in this suit thereon against him by Banister, administrator of the assignee of the note, interpose the defense that the note of Neville to the bank on which Banister was surety has been paid off, and that, therefore, the consideration for the assignment of the note sued on has wholly failed. It is conceded that there is no question about the sufficiency of the consideration for which the note was given. When Neville paid off and discharged the note to the bank, on which Banister was his surety, this fact had the operative effect to reinvest in the former the beneficial interest, the equitable title to the pledged note, leaving in the latter only the naked legal title. The production of the note in court, with the indorsement of Neville, the payee, thereon, constituted *prima facie* evidence of ownership in Banister, administrator. *Ashbrook v. Letcher*, 41 Mo. App. 370; *Mechanics' Bank v. Wright*, 53 Mo. 153; *Rubelman v. Nichol*, 13 Mo. App. 584. As such holder he could sue in his own name, subject to all defenses against the real owner. *Cummings v. Kohn*, 12 Mo. App. 585; *Saulsbury v. Corwin*, 40 Mo. App. 373.

While it is necessary to support the transfer of a promissory note that it should rest upon a sufficient consideration, the maker cannot interpose the want of this as a defense at the suit of the indorsee against him. The reason upon which this rule is founded probably is, that such a defense would be unjust, since the maker concedes that there was a good consideration between the original parties to the note, and the attempt to defeat a just claim by setting up matter which does not tend to show either that the maker does not owe the amount, or that if he pays it to the indorsee he can be called upon to pay any part of the same debt again. This matter in no way concerns the maker of the note, and he cannot raise it to avoid its payment. *Goldstein v. Winkelman*, 28 Mo. App. 433; *Saulsbury v. Corwin*, 40 Mo. App. 373; *Million v. Ohnsorg*, 10 Mo. App. 432;

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Burt v. Priest, 10 Mo. App. 543; Tiedeman on Com. Paper, sec. 154; *Shane v. Lowry*, 48 Ind. 205; *McWilliams v. Bridges*, 7 Neb. 423. The want of consideration for the transfer of a note by indorsement is a good defense only in an action by the indorsee against his immediate indorser. Tiedeman on Com. Paper, sec. 154. No error being discovered in the action of the circuit court of which complaint is made, its judgment must be affirmed. All concur.

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THE STATE OF MISSOURI to the use of RAY COUNTY, Respondent, v. THE ST. JOSEPH, ST. LOUIS & SANTA FE RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, November 9, 1891.

1. **Railroads**: SIGNALS AT CROSSING: PLEADING: OWNER. In an action against a railroad corporation to recover the statutory penalty for failing to give the statutory signals at a public road crossing, it is sufficient to allege that defendant "has been operating and running" the railroad in question. Whether defendant had been operating such railroad as owner, lessee or otherwise, the requirement of "owner," under the statute, has been fulfilled.

2. ——: ——: OWNER: EVIDENCE. The evidence examined and *held* sufficient to hold the defendant as operator of the railroad in question.

3. ——: ——: EVIDENCE OF PUBLIC ROAD. Where the evidence tends to show that the public road has been traveled and worked from ten to fifteen years, it is a sufficient showing of a "traveled public road" named in the statute requiring signals at public crossings.

Appeal from the Ray Circuit Court.—HON. JAMES M. SANDUSKY, Judge.

AFFIRMED.

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Gardiner Lathrop, *C. T. Garner, Sr.*, and *S. W. Moore*, for appellant.

(1) The information does not state facts sufficient to constitute a cause of action, or to constitute any offense. R. S. 1889, sec. 2608. The statute in question requires the giving of the statutory signals, "under a penalty of $20 for every neglect of the provisions of this section, to be paid by the corporation owning the railroad." There is no allegation that the defendant ever "owned the railroad," which is the gist of the action so far as its liability is concerned. (2) The finding and judgment are not supported by the evidence. We presume it will be conceded by plaintiff that some connection must be shown between this defendant and the cause of action, or the judgment will not find support in the evidence. We know of no rule of law which makes one corporation liable for the acts of another, without a showing of some contract relation between them. Witnesses, James Smith and Walter Smith, did not pretend to testify from independent recollection, but stated that they knew that a train passes, etc., because they "set it down in a book." We submit this statement is no legal evidence of the facts sought to be proved. Witnesses having no recollection of the facts, the book was the only competent evidence, and that was not introduced. *Wolf v. Matthews*, 39 Mo. App. 376, 379; *Anderson v. Volmer*, 83 Mo. 403, 408. (3) The existence of a public road should have been proved by the record, if there was one. Parol testimony is incompetent for this purpose, unless it affirmatively appears that there was no record. Elliott on Roads & Streets, pp. 662 665; *Lathrop v. Railroad*, 69 Iowa, 105; *Whetton v. Clayton*, 111 Ind. 360; *Monagan v. School Dist.*, 38 Wis. 101; *O'Mally v. McGinn*, 53 Wis. 353; *Smith v. Lawrence*, 12 Mich. 431; *Saubon v. School Dist.*, 12 Minn. 17; *Allen v. City of*

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Vincennes, 25 Ind. 531; *United States v. Kuhn*, 4 Cranch, 401; *District of Columbia v. Johnson*, 1 Mackey, 51.

T. N. Lavelock, for respondent.

(1) The information is sufficient. *State ex rel. v. Railroad*, 89 Mo. 562; *State ex rel. v. Railroad*, 89 Mo. 571. (2) It is no longer an open question in this state that the continued use of a road by the public for a period of ten years will constitute a public highway. *State v. Walters*, 69 Mo. 463; *State v. Wells*, 70 Mo. 635; *State v. Proctor*, 90 Mo. 334; *State v. Bradley*, 31 Mo. App. 308. (3) A penalty may be recovered of the corporation incurring it, whether that corporation is the absolute owner or lessee of the railroad. R. S. 1889, sec. 2568; Redfield on Railways, sec. 145, subd. 2, pp. 640, 641; *Smith v. Railroad*, 61 Mo. 17. (4) The corporation operating the railroad is, for all the purposes of this statute, the owner of it, and is primarily liable. 1 Redfield on Railways, sec. 142, subd. 3, pp. 618, 620; 1 Rorer on Railroads, sec. 11, p. 522; *Linfield v. Railroad*, 10 Cush. 522; *Railroad v. Sly*, 65 Pa. St. 205.

GILL, J.—This is an action instituted before a justice of the peace to recover the statutory penalty of $20, under section 2608, Revised Statutes, 1889, for the alleged failure on the part of the defendant to ring the bell or sound the whistle at a public crossing. The justice of the peace before whom the case was tried rendered judgment for the plaintiff; upon appeal to the circuit court, evidence was heard by the court, a trial by jury having been waived, and judgment rendered for the plaintiff, from which the defendant has prosecuted its appeal.

I. The first point presented for reversal is, that the statement or complaint filed with the justice is insufficient in that it states only that defendant corporation "has been operating and running the St. Joseph, St. Louis & Santa Fe railway, from North Lexington,

in Ray county, Missouri, to the city of St. Joseph, in Buchanan county, Missouri; that said railroad was *run and operated* by defendant, by its agents, servants, engines, trains and cars," whereas the statute requires the statutory signals under "a penalty of $20 for every neglect of the provisions of this section to be paid by the corporation *owning* the railroad."

There is no merit in this contention. If the defendant was at the time in the possession of and running and operating the railroad in question, it was presumptively the owner; and in the absence of a contrary showing the court would be authorized in holding defendant to be the owner. More than this whether defendant was operating this railroad as absolute owner, lessee, or otherwise, it was liable for the violation by it of the provisions of this statute. It filled the requirement of "owner" under this statute. 1 Rorer on Railroads, p. 553; 1 Redfield on Railways [6 Ed.] sec. 142; *Brown v. Railroad*, 14 Mo. App. 580.

II. It is further contended that there was an absence of evidence that the defendant was operating this line of railroad, and, with some show of earnestness, counsel assert that the prosecuting witness gave evidence that some other railroad company than defendant operated the railroad.

The following testimony is quoted: "*Q.* What road was this train running on? *A.* It was this road running here to Richmond, the St. Joseph, St. Louis & Santa Fe, at that time the St. Joseph & St. Louis railroad." While this language is by itself somewhat ambiguous, it would seem that the court was justified in the understanding that in the last clause of the answer the witness only repeated in an abbreviated form the defendant's corporate name, and that he did not mean to say that the offense was committed by some other railroad company. Besides from the other witnesses it may be as well understood that the defendant at that time was running and operating the offending train. If defendant

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had any such defense as this it should have introduced the contradictory testimony, and not trusted to this, "hanging upon the mere bark," or "slip of the tongue."

III. The third and last point made in appellant's brief is to the effect that plaintiff failed to show that there was an established public road at the crossing where defendant neglected to ring the bell or sound the whistle. There is no showing in this record for such contention. The evidence is ample to justify plaintiff's claim of the existence of a public traveled road leading out from the town of Lawson, into Ray county, and crossing defendant's railroad. One witness stated that he had known that highway for about ten or twelve years. Witness Crawley testified. that he knew the road mentioned by other witnesses, and that "it has been a public traveled road for from fifteen to eighteen years. It has been worked that long," etc. This was a sufficient showing of a "traveled public road" named in the statute. It was not required that it should be shown by the records of the county court that the road had been established by proceedings in that court. 1 Rorer on Railroads, p. 552; R. S. 1889, sec. 7847.

Judgment affirmed. All concur.

THOMAS R. HARPER, Appellant, v. J. D. MORSE, Respondent.

Kansas City Court of Appeals, November 9, 1891.

Public Roads: ORDER OPENING: EVIDENCE OF IRREGULARITIES. If a road has been opened by an order of the county court, and a plat thereof has been filed in the clerk's office, and such road has been used for ten years or more, then it is a public road; and evidence to show irregularities in the court proceedings to open it are inadmissible.

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Appeal from the Audrain Circuit Court.—Hon. E. M. Hughes, Judge.

Affirmed.

Barker & Shackelford and *John M. Barker*, for appellant.

The court admitted improper evidence over plaintiff's objections. The court excluded proper and legal evidence offered by the plaintiff. 2 Wagner's Statutes of 1872, secs. 8, 9, 10, p. 1220; *Railroad v. Young*, 96 Mo. 39, and cases there cited; *Mitchell v. Railroad*, 82 Mo. 106; *Backenstoe v. Railroad*, 86 Mo. 492; *King v. Railroad*, 90 Mo. 529; *Ellis v. Railroad*, 51 Mo. 200; *Carpenter v. Grisham*, 59 Mo. 241; *Whitely v. Platte Co.*, 73 Mo. 30; *Lind v. Clemmons*, 44 Mo. 540.

W. W. Fry, for respondent.

Our statute provides that all roads which have been opened by order of the county court, and plat thereof filed, and have been used for public travel for ten years, shall be deemed legally opened and established, notwithstanding there were irregularities in the proceedings to establish and open the same. In this view alone the evidence is admissible. R. S. 1889, sec. 7847; *State v. Proctor*, 90 Mo. 334. We also insist that, if there were irregularities in the proceedings, they cannot be collaterally attacked, as in this proceeding. The owner of the land taken can alone question it. *Galahar v. Gales*, 20 Mo. 236; *State ex rel. v. County Court*, 80 Mo. 500.

Gill, J.—Plaintiff Harper sued the defendant Morse for double damages under the statute, on account of an alleged trespass in throwing down plaintiff's fences and permitting cattle to get in and destroy his crops.

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The case originated in the circuit court of Montgomery county, was taken by change of venue to Audrain county, where a trial was had before a jury with verdict and judgment for defendant, and plaintiff appealed. The plaintiff's abstract is so very unsatisfactory (and unfair) that it is difficult to get therefrom a clear understanding of what complaint is made. Much is said about the error in giving certain instructions for defendant, and yet some of these instructions complained of are not set out in the abstract. Several instructions were given at the request of plaintiff, yet none of these are set out in the abstract. Again, in appellant's brief, fault is found with the trial court for excluding certain evidence offered by plaintiff, whereas it is not shown by the record that plaintiff made an offer of the rejected evidence.

However, we understand the case to be about this: Plaintiff and defendant owned and occupied adjoining farms, the division line running north and south. Along the dividing line was a thirty-foot public road, at least it was so claimed by defendant, and testified to by a number of witnesses for defendant. The plaintiff made claim to the strip thus used as a road and fenced the same. Defendant tore away the obstruction, and hence this suit. To sustain defendant's claim that there was a public road at this point, he offered and read in evidence an order of the county court of Montgomery county, made in 1873, establishing and opening the road, and along with it the plat thereof made and filed in the county clerk's office. Defendant also produced evidence tending to prove that the road was opened and used as such by the public for fifteen years or more. Plaintiff, to overcome this proof, seems to have attempted to show some irregularities in the proceedings in the county court, for the purpose of invalidating the order declaring the road established and opened. The circuit court, on this state of facts, gave this among other instructions: "The court instructs

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the jury if they find from the evidence that a road has been opened by an order of the court of Montgomery county, Missouri, between the lands occupied by plaintiff and defendant in this cause and a plat made thereof and filed with the clerk of the county court, and that such road was used as a public road by the traveling public for a period of ten years or more prior to the time when plaintiff fenced across it in 1888, then the jury may find that said road was a public road, when plaintiff built the fence across the same."

This instruction was properly given, and the court rightfully declined, under the facts of this case, to permit plaintiff to show any alleged irregularities in the proceedings had to establish and open the road in controversy. Section 7847, Revised Statutes, 1889, provides that "all roads in this state, that have been opened by any order of the county court, and a plat made thereof and filed with the clerk of the county court of the county in which said roads are situated, and have been used as a public highway by the traveling public for a period of ten years or more, shall be deemed legally opened and established county roads, notwithstanding there may have been irregularities in the proceedings had to establish and open such roads," etc.

We have read and considered every point made, or attempted, in appellant's brief, and discover no reason whatever for disturbing the judgment herein. The same is, therefore, affirmed. All concur.

E. Bowne, Respondent, v. The Hartford Fire Insurance Company, Appellant.

Kansas City Court of Appeals, November 9, 1891.

1. **Witnesses:** COMPETENCY AS TO VALUES: CROSS-EXAMINATION. If a witness says he knows the value of the articles in question, he can testify to such value. His means of knowledge will be proper subject for cross-examination.

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2. **Insurance**: EVIDENCE OF NOTICE: HARMLESS ERROR: FRAUD. Where there is no objection by the insurer as to the claim for loss except upon grounds of fraud, the admission in evidence of a conversation with defendant's local agent as to notice of loss, if erroneous, is harmless.

3. ——— : NOTICE OF LOSS: INSTRUCTION. Where defendant investigated the loss and acted as though proper notice had been given, an instruction assuming such notice works no harm.

4. ——— : EVIDENCE: VALUES: PROOF OF LOSS. While the values stated in the proofs of loss are not evidence of such values, yet an instruction so declaring ought not to be so worded that the jury might well understand that they were directed not to consider plaintiff's estimates of value in his testimony.

5. ——— : JAPANESE VASE INCLUDED IN HOUSEHOLD FURNITURE. A Japanese vase is included in "household furniture, useful and ornamental."

Appeal from the Howard Circuit Court.—HON. JOHN A. HOCKADAY, Judge.

AFFIRMED.

Clark & Silvey and *Fyke & Hamilton*, for appellant.

(1) The court admitted improper evidence on the part of plaintiff: *First.* In permitting plaintiff, without showing any knowledge upon the subject, to testify as to the value of the goods. *Miller v. Bryden*, 34 Ill. App. 602; *Guest v. Ins. Co.*, 33 N. W. Rep. 31; *Frederick v. Ins. Co.*, 28 Ill. App. 215. *Second.* In permitting plaintiff to testify to conversation with local agent, after the fire. *Williams v. Edwards*, 94 Mo. 447. *Third.* In refusing to permit defendant, on cross-examination, to test plaintiff's knowledge and recollection as to the cost and value of the goods. (2) The court erred in giving plaintiff's instruction, numbered 1, as to notice. (3) The court erred in refusing defendant's instruction, numbered 7. It is well settled that the estimate of value stated in the proofs of loss is no evidence upon that subject, and it was prejudicial error

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to refuse to so instruct the jury. *Newmarket v. Ins. Co.*, 30 Mo. 160; *Brown v. Ins. Co.*, 68 Mo. 133; *Ins. Co. v. Semnett*, 41 Pa. St. 161; *Ins. Co. v. Schrefler*, 42 Pa. St. 188; *Ins. Co. v. Lewis*, 42 Ga. 587. (4) The court erred in refusing defendant's eighth instruction, as to Japanese vase.

S. C. Major and *Draffen & Williams*, for respondent.

(1) Plaintiff's testimony as to the value of the goods destroyed was competent. She bought many of the articles herself, and was present when others were purchased. *Ins. Co. v. Horton*, 28 Mich. 173; 1 Thompson on Trials, sec. 380; *Seyforthe v. Railroad*, 52 Mo. 449; 1 Sutherland on Damages, p. 796. (2) Proof of notice was unnecessary, however. The defendant received the proof of loss, and made no objection to any want of notice, and refused to pay the loss because of alleged fraud. *LaForce v. Ins. Co.*, 43 Mo. App. 618. (3) The trial court did not err in refusing defendant's seventh instruction. *Cole v. Long*, 1 Mo. App. 216; 2 Thompson on Trials, sec. 2349; *Bradford v. Parson*, 12 Mo. 71; *Miller v. Miller*, 14 Mo. App. 418; *Julian v. Calkins*, 85 Mo. 202; *Pritchett v. Herrett*, 91 Mo. 547. (4) There was no error in the refusal of the court to declare as a matter of law, that the Japanese vase was not covered by the policy. The evidence showed that it was a parlor ornament. 1 Wood on Fire Ins. 134. It is clear that the plaintiff intended to include all of her "household goods, useful and ornamental." If there was any question as to whether the vase was an article of household furniture, "useful or ornamental," it was a matter for the jury, and the court properly refused the instruction asked. *Lead & Zinc Co. v. Ins. Co.*, 27 Mo. App. 440.

Ellison, J.—This action is on a policy of insurance. Plaintiff recovered below, and defendant appeals.

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The first alleged error is that plaintiff was permitted to testify as to the value of the goods without first showing she had any knowledge of their value. She testified that she knew their value, and stated what that value was. Her means of knowledge were proper subjects of cross-examination.

The second alleged error is that the assured should not have been permitted to testify to a conversation with defendant's local agent as to notice of loss. This testimony, if erroneously admitted, was harmless under the circumstances shown in this case. No objection was made by the company as to the claim except upon the ground of fraud. Other objections to testimony were made but we do not think they materially affect the case.

The criticism of plaintiff's first instruction as to its assuming that notice of loss was given could be conceded, and yet work no harm to the result. The whole case shows that defendant entered into an investigation of the loss and acted as though proper notice had been given.

The following instruction offered by defendant was refused: "7. The court instructs the jury that the estimate of value of the various articles mentioned in the list attached to proofs of loss offered in evidence, made by assured, is no evidence of the value of such articles." While the values stated in the proofs of loss are not evidence of such value (*Newmarket v. Ins. Co.*, 30 Mo. 160; *Brown v. Ins. Co.*, 68 Mo. 133), yet the instruction here refused is so worded that the jury might have well understood the court to direct them not to consider plaintiff's estimate of value which she had given in her testimony before them. By comparing this instruction with those found in the cases cited, the difference is quite apparent.

Among other articles lost by the fire was a Japanese vase, valued at $500. The policy contained the following provisions: "On the following described property,

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while located and contained as described herein, to-wit, $1,300 on household and kitchen furniture, useful and ornamental, including beds, bedding, linen, carpets, family wearing apparel, trunks, sachels, printed books and music, musical instruments, sewing machines, mirrors, pictures, paintings, engravings and their frames, at not exceeding cost, plate and plated ware, china, glass and crockery ware, fuel and family supplies, all while contained in the above-described dwelling-house, and part contained or stored in the one-story, frame, shingle-roof building used by assured as a storeroom."

In our opinion, the vase being in the house and a part of its furnishing was included within the terms of the policy quoted, and defendant's instruction, declaring it was not, was properly refused. The vase was a part of the house furniture, and, if not useful, belonged, at least, to that ornamental class of furniture now common with those who feel able to indulge the luxury. On the whole case we are for affirming the judgment, and it is so ordered.

J. H. DAVIS, Respondent, v. THE WABASH RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, November 9, 1891.

1. **Railroads:** OPEN GATE: STATUTE: COMMON LAW. A complaint against a railway company alleged that the defendant negligently and wrongfully permitted to be and remain open a certain gate in a railroad fence whereby a certain cow of plaintiff's entered upon defendant's railroad and was killed. The proof showed the gate, some sixty yards from the right of way, had been put in for its own use by a coal company, whose land abutted upon the right of way, and there was no fence between the coal land and the right of way. *Held*, plaintiff can predicate no right to recovery against defendant upon its failure to keep the gate of the coal company closed, since the statute imposed no such duty and the common law does not require a railway company to fence its right of way. The theory of an instruction set out in the opinion *held* not warranted by the statute.

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2. ——— : KILLING STOCK : NEGLIGENCE. Where the evidence fails to show that the engineer in charge of the train ever saw the cow sued for, before he struck her, or that after seeing her, if such was the fact, the train could have been stopped with safety before striking her, but, on the contrary, shows the collision was almost simultaneous with her getting on the track in an attempt to cross before the engine, there can be no recovery.

Appeal from the Randolph Circuit Court.—HON. JOHN A. HOCKADAY, Judge.

REVERSED AND REMANDED.

Geo. S. Grover, for appellant.

(1) Upon the testimony in this case the court should have directed a verdict in favor of the defendant. *First.* Because of the open gate. *West v. Railroad*, 26 Mo. App. 344; *Morrison v. Railroad*, 27 Mo. App. 418; *Ridenour v. Railroad*, 81 Mo. 227. *Second.* Because no negligence was shown in the management of the train. *Young v. Railroad*, 79 Mo. 336; *Ravenscraft v. Railroad*, 27 Mo. App. 617. (2) The court gave improper and refused proper instructions. Authorities cited, *supra.*

No brief for respondent.

SMITH, P. J.—This was a suit brought before a justice of the peace to recover $40 damages for the killing of a cow. The complaint alleged that defendant by the negligence of its employes did wrongfully permit to be opened and remain open a certain gate in its railroad fence by reason of which a certain cow of plaintiff entered and passed from the public highway and commons upon defendant's railroad track, and was killed. There was also the further allegation in the complaint, that the cow "being so on said track" defendant by its agents and servants did negligently and wrongfully run an engine and cars over and killed said cow.

At the trial in the circuit court evidence was adduced which tended to show that, at the place

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mentioned in the complaint, the defendant's right of way was fenced except at a point on the east side thereof, where a coal company had a shaft on a small piece of ground which abutted against the right of way. The railroad fence, instead of running between the right of way and the coal land, passes around and inclosed it with the right of way. At this point the fence south of the coal land is about sixty yards—the witnesses are not in accord in their testimony as to this exact distance—from the right of way. The gate is on the south side of the coal land, and was placed there by the coal company for its use. This gate was frequently left open. The section boss of the defendant frequently shut it. It was, he states, shut on the evening preceding the day of which plaintiff's cow was killed. On the morning of the day, which was Sunday, that the cow was killed, the gate was found open. The plaintiff's cow was that morning turned out of a pasture upon uninclosed lands along which the defendant's road runs, and was killed early in the afternoon. No one saw her pass through the gate. The facts and circumstances detailed in the evidence justified the inference that she did pass through this gate and from thence onto the coal land from where she strayed upon the defendant's right of way and track. After she entered the right of way she turned west, and finally got upon the track in a cut where she was run over and killed by a passing freight train.

The evidence shows that she had just "got on the track when she was struck." "She was going over the track to the west side, and before she got entirely across the train struck her."

The court instructed the jury upon both theories of the complaint. The judgment was for plaintiff, and defendant appeals.

I. The defendant's right of way was unfenced at the point where the plaintiff's cow entered upon its right of way. It is the duty of a railroad corporation to fence

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its right of way everywhere except where it runs through cities, towns, villages and at public crossings and depot grounds. *Morris v. Railroad*, 79 Mo. 368; *Rutledge v. Railroad*, 78 Mo. 286; *Rozelle v. Railroad*, 79 Mo. 349; *Emmerson v. Railroad*, 35 Mo. App. 621. There is no fact shown here which brings it within any of the exceptions which have been mentioned. The fact that there was a coal pit on the piece of land which adjoined the right of way, and which was inclosed by the same fence, afforded no excuse to the defendant for the non-performance of the statutory duty. The statute imposed no duty upon the defendant to erect or maintain the fence or gate therein, which inclosed the coal land. It was neither on the right of way nor between it and the abutting land. The gate was not at a farm crossing, and was not required by statute. R. S., sec. 2611. The defendant was not bound to keep the gate of the coal company, so situate, closed, nor was it liable to plaintiff because his cow passed through it and was killed. The plaintiff can predicate no right of recovery against defendant upon its failure to keep the gate of the coal company closed. The statute imposed no such duty, and hence there could be no neglect of a duty not imposed.

The instructions of the court which directed the jury that, if they found that, although the gate through which plaintiff's cow went upon defendant's road was not on the right of way, and was put there for the use of the coal company, yet if they further believed the gate composed part of the fence that inclosed defendant's railroad, and, when open, left defendant's railroad exposed so stock could go thereon, then such gate was part of defendant's fence and it was its duty to keep it closed. The common law imposes no duty upon a railroad to fence its right of way. The statute enjoins this duty and defines when, where and how it shall be performed. It was no more the duty of the company to erect or maintain a fence, or gate therein, sixty

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yards from its right of way than it would be six hundred yards therefrom. If the fence in question had inclosed one hundred and sixty acres of land instead of the small piece of coal land, which it did, and the gate had been half a mile away from the right of way instead of the distance it was, the principle asserted by the instruction would have been equally applicable to it. It would have been the duty of the defendant, in the case supposed, to keep such gate closed. This manifestly is not within the requirement of defendant's statutory duty in respect to gates in the fences along its right of way. The theory of the plaintiff's instruction is not warranted by the statute.

II. And, as to the instruction which told the jury that, if they believe the defendant, while operating and running its engine and cars, did negligently and wantonly run the same over the plaintiff's cow, and mortally cripple her, their verdict should be for plaintiff; whether defendant knew, or could have known, the gate was open or not, it is to be observed that it was not proved that the engineer of the train in question ever saw the cow before he struck her, or that, after seeing her, if such was the fact, the train could have been stopped with safety to it before striking the cow. Not only that, the proof was, the collision was instantaneous; or that, when the cow attempted to cross the track, she was instantly thereafter struck and killed. The inculpatory fact is wanting, and there could be no recovery on that theory of the case. There was no evidence upon which to base this instruction. *George v. Railroad*, 79 Mo. 336; *Ravenscraft v. Railroad*, 27 Mo. App. 617. The plaintiff's cause of action, if any he has, arises in the breach by the defendant of its statutory duty to fence its right of way at the place where the plaintiff's cow entered thereon.

It follows the judgment must be reversed, and the cause remanded. All concur.

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THE BLANK & BROTHER CANDY COMPANY, Appellant, v. WALKER & BROWNFIELD, Defendants; W. W. VASSE, Interpleader, Respondent.

Kansas City Court of Appeals, November 9, 1891.

Assignments: PARTNERSHIP: DEED OF ONE PARTNER FOR THE FIRM. One partner, by the direction and consent of the other, can, in the name and on behalf of the firm, make a valid deed of assignment for the benefit of the firm creditors.

Appeal from the Randolph Circuit Court.—HON. JOHN A. HOCKADAY, Judge.

AFFIRMED.

Willard P. Cave and *Martin & Terrill*, for plaintiff.

(1) The court erred in permitting defendants, J. F. Walker and J. H. Brownfield, to testify to parol authority said to be given by defendant Walker to defendant Brownfield to make a general assignment of all the firm assets for the benefit of creditors, as such authority should have been given by proper instrument under seal and duly acknowledged. R. S. 1889, sec. 424. (2) The court erred in permitting defendant, J. H. Brownfield, to testify, over plaintiff's objection, to what his partner, J. F. Walker, said to him relative to his, Brownfield's, making an assignment of all the firm assets for the benefit of creditors. (3) One partner has no power to make a general assignment of the partnership effects for the benefit of the creditors of the firm. *Hook v. Stone*, 34 Mo. 329; *Shattuck v. Chandler*, 40 Kan. 516. (4) The court erred in admitting in evidence the instrument, dated January 3, 1890, executed by defendant Brownfield, alone purporting to convey

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all the firm assets to Vasse, the interpleader, for the benefit of creditors. R. S. 1889, sec. 424; Burrill on Assignments [4 Ed.] p. 362.

B. S. Head, for respondent.

(1) The assignment made by defendant Brownfield on January 3, 1890, for the firm of Walker & Brownfield, to respondent, W. W. Vasse, for the benefit of all the creditors of said firm, is in every respect valid, and was "proved or acknowledged, and certified and recorded in the same manner as is prescribed by law in cases wherein real estate is conveyed." R. S. 1889, sec. 424. (2) One member of a firm, without the consent of the other members, has no power to make a general assignment of the partnership effects for the benefit of the creditors of the firm; but he may do so, if he has the consent of his partners and the assets are all personal property, as is the case at bar; and no special formalities are required in the giving or manifestation of such consent. It may be given by words spoken, or by letter sent by mail, or otherwise. 58 Mo. 532; *Ely v. Hair*, 16 B. Mon. (Ky.) 230; *Welles v. March*, 30 N. Y. 344; *Baldwin v. Lyons*, 19 Abb. Pr. (N.Y.) 32.

Gill, J.—This is a contest over the title of a grocery stock at Moberly. It arises out of the following state of facts: Defendants Walker & Brownfield had two grocery stores, one at Moberly, and one at Leesburg, seventeen miles from Moberly. Walker resided, and managed the business, at Leesburg, while Brownfield lived, and had charge of the store, at Moberly. Before the occurrences here related, however, the store at Leesburg was closed out by the firm. On January 3, 1890, Brownfield, claiming to act for and in behalf of his firm executed and acknowledged, in the firm-name, a deed of assignment to interpleader Vasse; the instrument purporting to convey the entire personal assets of the partnership for the benefit of the firm creditors.

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While Walker did not join in the execution of the deed of assignment, the evidence shows beyond dispute that he authorized Brownfield to make the assignment for the firm. The authority is shown to have been given by Walker to Brownfield in this manner: Only a few days before the execution of the assignment Brownfield went to Walker at Leesburg, and after consulting over the financial condition of the Moberly store, Walker advised an assignment, and instructed Brownfield to return to Moberly and make an assignment for the firm for the benefit of all the creditors alike. Thereupon Brownfield, in the name of the firm, made the assignment in question.

A few days thereafter (to-wit, January 11, 1890) these plaintiffs sued the firm of Walker & Brownfield in attachment and levied upon the goods assigned, and which were then in the assignee Vasse's possession. In due time Vasse, the assignee, interpleaded for the goods. The issues were tried before the court, without a jury, who found for the interpleader, and from a judgment thereon plaintiffs have appealed.

I. The single question is here presented. Is the deed of assignment made by Brownfield, signed and acknowledged by him for the firm of Walker & Brownfield, a valid conveyance, such as places the ownership of this personal property in Vasse, the interpleader. The circuit court trying this cause held in the affirmative. We are of the same opinion, and shall affirm the judgment.

On the question of whether or not a deed of assignment conveying the entire personal assets of a copartnership for the benefit of all the partnership creditors is valid, unless signed and acknowledged by all the partners, there has been much contrariety of opinion. Some courts have decided the one way, others the contrary. Some have said that the execution of such a conveyance was within the scope of agency and power resting with the individual member or members of the

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firm. While other courts have denied any such authority. It will serve no useful purpose in this case to review these authorities. The various rulings have been faithfully and industriously collated by Mr. Burrill in his work on assignments. Burrill on Assignments [5 Ed.] pp. 107-131, and numerous cases there cited. The supreme court of this state has adopted the negative of this general proposition, and holds that one partner is not empowered, by virtue of the copartnership relations, to make a general assignment of the partnership effects, so as to bind the other. *Hughes v. Ellison*, 5 Mo. 463; *Hook v. Stone*, 34 Mo. 329.

While our supreme court has denied this authority as implied by force of the partnership relation, it has *not* been decided by it that a deed of assignment made by one partner for the firm *with the express assent and direction* of the other members would be invalid. This exact condition of things has not, that I am aware of, ever been presented for decision to the appellate courts of this state. But wherever presented and decided in other courts the holding is quite uniform that one partner may, with the consent of his associate, make a valid deed of assignment. Burrill on Assignments, pp. 107, 126; *Wells v. March*, 30 N. Y. 344; *Baldwin v. Tyne*, 19 Abb. Pr. 32; *Shattuck v. Chandler*, 40 Kan. 516; *Ely v. Hair*, 16 B. Monroe (Ky.) 230. The case at bar comes clearly within the rule announced in these authorities. Brownfield was authorized and directed by his copartner Walker to make this deed of assignment for the firm. Walker cannot dispute its validity, nor can these creditors who stand in his shoes. *Ely v. Hair*, *supra*, p. 238. Judgment affirmed. All concur.

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TENNANT, WALKER & Co., Appellants, v. W. P. McKEAN, Respondent.

Kansas City Court of Appeals, November 9, 1891.

1. **Partnership:** CREDITOR'S LIEN DERIVED THROUGH PARTNER'S RIGHT. Each partner has a lien on the whole partnership effects and the right during the life of the partnership to have the effects applied to the discharge of partnership debts. This lien the partner can waive and does so by a sale; and there remains nothing through which the creditor can work out his right to a lien, which is wholly derivative by a sort of subrogation from the partner's lien. So where one of two partners sells by consent of his partner to a third person, to whom the remaining partner, in a short time, as contemplated in the making of the first sale, also sold his interest, a creditor of the firm has no lien, and cannot in the absence of fraud follow the goods into the hands of such third party.

2. ——— : ——— : CUSTODIA LEGIS. The partnership creditor's right is an administrative right, and can only be obtained by laying hold of the property and placing it in *custodia legis* as upon death, assignment, bankruptcy, insolvency or by attachment for fraud.

3. ——— : ——— : REMEDY. The partnership creditor as such has no more lien on partnership, than the individual creditor has on individual, effects, in case of a "going concern," until he puts his demand in judgment and seizes the property under execution before a *bona fide* disposition is otherwise made.

Appeal from the Cooper Circuit Court.—HON. E. L. EDWARDS, Judge.

AFFIRMED.

A. W. Anthony and *John A. Gilliam*, for appellants.

(1) A person buying the interest of a partner in a stock of goods becomes a tenant in common with the other partner or partners; becomes entitled to an account, and is entitled only to the aliquot portion of their value after all

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debts of the partnership are paid. *Tennant, Walker & Co. v. Guenther & Blackman*, 31 Mo. App. 429; *Marx v. Goodnough*, 16 Pac. Rep. 918; *Dyckman v. Valiente*, 42 N. Y. 549; 1 Story, Eq. Jur. 466; *Early v. Friend*, 16 Gratt. 21; *Leach v. Beattie*, 33 Vt. 195; *Wright v. Wright*, 59 How. Pr. 176; *Hodges v. Pingree*, 10 Gray, 15; *Goodenow v. Ewer*, 16 Cal. 461; *Darden v. Cooper*, 7 Jones (N. C.) 210; Parsons' Part. 359; *Mudd v. Bast*, 34 Mo. 465; Story, Part., secs. 3072, 3078; *Spaunhorst v. Link*, 46 Mo. 199; 2 Lindley, Part. 698; Story on Part., secs. 324, 325; *Nicoll v. Mumford*, 4 Johns. Ch. 522 *Robbins v. Cooper*, 6 Johns. Ch. 186; 2 Lindley, Part. 359, 360; *Wilson v. Strobach*, 59 Ala. 488; *Daniel v. Owens*, 70 Ala. 297; *Weaver v. Ashcroft*, 50 Tex. 428; *Atwood v. Meredith*, 37 Miss. 635; *Phillips v. Cook*, 24 Wend. 389; 1 Am. Lead. Cases, 323; *Fox v. Hanbury*, Cowper, 445–449. (2) Aside from all other views of the case, if this court finds from the evidence of Guenther and McKean an intent to defraud the creditors of Guenther & Blackman it will hold McKean to be a trustee *in invitum* for all the property received by him, for the benefit of Guenther & Blackman's creditors. Pomeroy, Eq. Jur., secs. 1051, 1053, 1047, 1048, 1058, 1044; Story's Eq. Jur., secs. 1255, 1262, 1263, 1265; *Pennell v. Deffell*, 4 De G. M. & G. 372; *Rolfe v. Gregory*, 4 De G. Jones & Smith, 576; *Ex parte Cook*, 4 Chan. Div. Rep. 123; *Hallett's Estate*, 13 Chan. Div. Rep. 696; *Mayor v. Murray*, 7 De G. M. & G. 497; *Ernest v. Croysdell*, 2 De G. F. & J. 115; *Burnett v. Gustafson*, 54 Iowa, 86; *Newton v. Porter*, 69 N. J. 113; *Bank v. Pollock*, 4 Edw. Ch. 215; *Phelps v. Jackson*, 31 Ark. 272; *Hammond v. Pennock*, 61 N. Y. 155; *Hendrix v. Nunn*, 46 Tex. 141; *Viele v. Blodgett*, 48 Vt. 279; *Harrison v. Smith*, 83 Mo. 210. (3) If there was not fraud in either of the sales, then McKean took only the interest of each individual partner in the stock subject to the payment of the firm debts, and the creditors can work out their equity through the partnership lien of either

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Guenther or Blackman. McKean on his purchase from Guenther took only an undivided and unascertained interest. *Cox v. Russell*, 44 Iowa, 556; *Carter v. Roland*, 53 Tex. 540; 1 Lindley on Part., secs. 359, 360, 364, 354. In this state, partnership creditors have an equitable lien upon the partnership assets. *Shackleford's Adm'r v. Clark*, 78 Mo. 491; *Julian v. Wrightsman*, 73 Mo. 569; *Bank v. Brenneisen*, 97 Mo. 145. All partnership claims must be satisfied before any other rights attach to firm assets. *Phelps v. McNealy*, 66 Mo. 554; *Wiles v. Maddox*, 26 Mo. 77; *State ex rel. v. Spencer*, 64 Mo. 355; Story on Part., sec. 360; Pars. on Part. 359, *et seq.*; *Flannigan v. Alexander*, 50 Mo. 50. If buyer has knowledge of misapplication it is a gross fraud on his part. If he buys without knowledge he gets no title. *Ackley v. Staehlin*, 56 Mo. 561; *Tenny v. Johnson*, 43 N. H. 144; *Phillips v. Cook*, 24 Wend. 407; *Dover v. Stauffer*, 2 Pa. 198; *Witter v. Richards*, 10 Conn. 37; *Parker v. Pistor*, 3 Bos. & Pul. 288; *Brewster v. Hammett*, 4 Conn. 540; *McDonald v. Beach*, 2 Blackford (Ind.) 55. (4) This case is properly brought against McKean; the case is fully made out by the evidence, and the court below should have found for plaintiffs, and this court should mold the proper judgment for the appellants, as all the necessary facts are before it. 2 Lindley on Part., secs. 460, 463; *State to use of Wolf v. Berning*, 74 Mo. 87. Appellate court can render such judgment as ought to have been rendered. *Darrier v. Darrier*, 58 Mo. 222; *Holt v. Simmons*, 16 Mo. App. 97; *Lionberger v. Pohlman*, 16 Mo. App. 392; *Russell v. Brown*, 21 Mo. App. 51; *Forrister v. Scoville*, 51 Mo. 268. Execution was useless here, and it was unnecessary. *Turner v. Adams*, 46 Mo. 95.

B. R. Richardson and *Draffen & Williams*, for respondent.

(1) While each member of a partnership has the right in equity to have the partnership assets applied to

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the payment of the debts of the firm, yet this right may be waived. Partnership creditors have no specific lien upon the property of their firm. Their rights are derivative through the equities of the partners among them selves, and only continue so long as the right of the partners continues. A *bona fide* waiver by the partners of their right to have the property so applied cuts off the derivative equities of the creditors. *Sexton v. Anderson*, 95 Mo. 373-81; *Wilcox v. Kellogg*, 11 Ohio, 394; *Machine Co. v. Bannon*, 4 S. W. Rep. 831; *Case v. Beauregard*, 99 U. S. 119; *Kimball v. Thompson*, 13 Met. 283; *Fitzpatrick v. Flannagan*, 106 U. S. 648; *Miller v. Estill*, 5 Ohio St. 508; *Huiskamp v. Wagon Co.*, 121 U. S. 310; *Hollis v. Staley*, 27 Am. Rep. 759; 1 Jones on Liens, secs. 788-9. (2) "If a partner, with the consent of the other partner, sells his half of the effects of the firm to a third person without fraud, and the other partner then sells his half to the same person, the latter gets a good title against all the world, and creditors cannot object." *Kimball v. Thompson*, 13 Met. 283; *Case v. Beauregard*, 99 U. S. 119; *Wilcox v. Kellogg*, 11 Ohio, 394; *Miller v. Estill*, 5 Ohio St. 508; *Sigler v. Bank*, 8 Ohio St. 511; *Moore v. Steel*, 3 S. W. Rep. 448; 1 Jones on Liens, secs. 791-2. (3) If, before the interposition of the court is asked, the property has ceased to belong to the partnership, if by a *bona fide* transfer it has become the several property either of one party or of a third person, the equities of the partners are extinguished, and, consequently, the derivative equities of the creditors are at an end. It is, therefore, always essential to any preferential right of the creditors, that there shall be property owned by the partnership, when the claim for preference is sought to be enforced. *Case v. Beauregard*, 99 U. S. 119; *Fitzpatrick v. Flannagan*, 106 U. S. 648; (Law Ed. Book 27, 211-14). (4) Even if there was a lien upon the goods in favor of plaintiffs, and even if defendant bought subject to that lien, still he had sold the goods,

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before the institution of this suit, and, according to plaintiffs' theory, must have sold them subject to the lien. The plaintiffs should pursue the property and enforce the lien which they claim to have thereon. Jones on Chattel Mortgages, sec. 464. (5) There is no question of fraud in this case, *first*, and chiefly, because there is not a particle of evidence showing, or tending to show, any fraud in fact upon the part of the defendant. There is nothing showing that he did not pay full value for the goods, or that he did not act in the utmost good faith in the entire transaction. Fraud must be proved. *Webb v. Darby*, 94 Mo. 621; *Crow v. Andrews*, 24 Mo. App. 160. *Second*. The theory of the petition is that the plaintiffs, as creditors of Guenther & Blackman, had a lien upon the goods for the payment of their debt, and that the defendant took them charged with that lien, and the petition seeks to enforce the same. No allegation of fraud is made, or even hinted at, in the petition. A party must abide by his pleadings. A plaintiff cannot recover upon a case not embraced in his petition. *Newham v. Kenton*, 79 Mo. 382; *Reed v. Bott*, 100 Mo. 62; *Leslie v. Railroad*, 88 Mo. 50; *Hammerslough v. Cheatham*, 84 Mo. 13; *Erwin v. Chiles*, 28 Mo. 576.

Ellison, J.—Plaintiffs' petition in this case was filed November 24, 1888, and alleged substantially the following facts: That the plaintiffs as partners, in August, 1884, sold a bill of boots and shoes, of the value of $551, to Guenther & Blackman; that the same became due February 1, 1885; that Guenther & Blackman were in partnership, engaged in merchandising; that in November, 1884, Guenther sold his interest in the stock of goods to the defendant, and subsequently, in December, 1884, Blackman also sold his interest in the stock to defendant; that on the third of August, 1888, plaintiffs obtained judgment against Guenther & Blackman for the amount due on their account; that, at the time of each

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of said sales to McKean, said firm of Guenther & Blackman was largely indebted to various parties and firms for the stock of goods so sold and transferred to defendant, amounting in the aggregate to $3,600, including the amount due the plaintiffs; that Guenther & Blackman are insolvent; that the goods were liable for the debts of said firm of Guenther & Blackman, and that defendant took same subject to the lien of the partnership creditors of such firm; and plaintiffs asked to have an account taken and the plaintiffs' judgment paid out of said goods, or the proceeds of those sold by defendant.

The evidence introduced by plaintiff showed that defendant purchased the goods without any notice that Guenther & Blackman were indebted; that he paid full value; that, when he bought out Guenther, he did so with the full knowledge and consent of Blackman, and with the understanding that he was to take Blackman's half of the goods in a short time, which he did in about two months; that the defendant purchased in 1884; that plaintiffs did not obtain judgments against Guenther & Blackman until August 3, 1888, and that this proceeding was not instituted until November, 1888, four years after defendant's purchase, and tended to show that none of the goods owned by Guenther & Blackman remained in defendant's possession when this action was commenced; but the same had been sold in the usual course of business to customers of defendant's store; that Guenther & Blackman each agreed to the sale to the defendant, and that it was understood between said Guenther & Blackman, when sale was made, that they personally would jointly pay the partnership debts, although defendant did not know of this understanding, or that there were any such debts. The finding was for the defendant, and plaintiffs have appealed.

The judgment was the only one which could have been rendered under the petition and evidence. There

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is no charge or proof of fraud, which leaves the case standing squarely on the law as to the rights of partnership creditors as against those who purchased the partnership property.

The petition is based upon the idea that partnership creditors have a lien on the partnership effects. This is an erroneous notion. The creditors have no lien. Each partner has a lien on the whole effects, which he, as such partner, during the life of the partnership, can see is utilized to the payment or discharge of the partnership debts. For he, being liable for the whole debt, is entitled, as a right inherent in the relation he bears to the partnership and the property, to have the effects used for the payment of partnership debts. The right of the creditor is wholly derivative—is derived through the partners. And it is well understood that the partner can waive this right or lien. *Sexton v. Anderson*, 93 Mo. 373; *Baker's Appeal*, 21 Pa. St. 76; *McNutt v. Strayhorn*, 39 Pa. St. 269; *Cooper's Appeal*, 29 Pa. St. 9. I apprehend that the lien is primarily for the protection of the partners, and whatever benefit is thereby conferred upon the creditor is by a sort of subrogation. If, therefore, one partner sells his interest to a third person, or the remaining partner, there is no equity attaching to the partnership effects in favor of the partnership creditors. *Ex parte Ruffin*, 6 Ves. 119; *Case v. Beauregard*, 99 U. S. 119; *Baker's Appeal*, 21 Pa. St. 76; *Allen v. Center Valley Co.*, 21 Conn. 130; *Fitzpatrick v. Flannagan*, 106 U. S. 648; *Huiskamp v. Wagon Co.*, 121 U. S. 310; Story on Part., sec. 358. The partner having parted with his own right by the sale, there remains nothing through which the creditor can work out his derivative right.

An application of these principles to plaintiffs' case destroys it. Here, one partner sold his interest to defendant; shortly afterwards the other partner sold to defendant. This left them without a lien on the partnership effects, and thereby destroyed or canceled the

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creditor's rights which depended upon such lien. The fact that the sale was by separate partners at separate times does not affect the result. The second sale was in contemplation by both partners when the first was made. *Kimball v. Thompson*, 13 Metcalf, 283.

II. Another equally well-established principle destroys plaintiffs' case. The partnership creditor's right is an administrative right, and can only be obtained by laying hold of the property—placing it in *custodia legis*, as upon death, assignment, bankruptcy or insolvency. In such case, there being no prior disposition, the partnership creditors are preferred to individual creditors, and they are permitted to obtain, and do obtain, preference by "working it out through the partner's lien." This has been permitted when the court has the property in custody by attachment for fraud. It was done in this state. *Phelps v. McNealy*, 66 Mo. 554. But that the property must be under control of the court follows from the peculiar nature of the creditor's rights, and his relation to the partnership. *Schmidlapp v. Currie*, 55 Miss. 597, and authorities, *supra*.

The partnership creditor, as such, has no more lien on partnership effects than the individual creditor has on individual effects; and a *bona fide* sale of the partnership effects carries the title unaffected by claim of simple contract creditors. If such creditors wish to realize from the effects of a partnership which is a "going concern," they ought to reduce these claims to judgment and seize the property under execution before a *bona fide* disposition is otherwise made.

The judgment is affirmed. All concur.

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THE STATE OF MISSOURI, Respondent, v. PERRY T. NIXDORF, Appellant.

Kansas City Court of Appeals, November 9, 1891.

Criminal Law: DRUGGISTS SELLING LIQUOR: INSUFFICIENT PRESCRIPTION. A prescription to protect a druggist in the sale of intoxicants thereon must state in substance, if not in words, that such intoxicant is a "necessary remedy;" and the statement that it is "to be used as a medicine" does not substantially comply with the demands of the statute.

Appeal from the Miller Circuit Court.—HON. E. L. EDWARDS, Judge.

AFFIRMED.

T. B. Robinson, with *Moore & Williams* and *W. S. Pope*, for appellant.

The sufficiency of the prescription was a question of law for the court; hence, the first instruction for the state was erroneous, and should not have been given. *State v. Clevenger*, 25 Mo. App. 653; *State v. Roberts*, 33 Mo. App. 524; *State v. Marchand*, 25 Mo. App. 658.

No brief for respondent.

GILL, J.—Defendant was indicted and convicted, as a registered pharmacist, for selling intoxicating liquor in less quantities than four gallons, without a written prescription from a regular registered, practicing physician. His fine was fixed by the jury at $100, and from the judgment thereon the defendant has appealed. A reversal of this judgment is sought on some alleged errors in the court's instructions. We have examined the entire record; and, while the court

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below committed error in instructing the jury, we must affirm the judgment, since upon the undisputed facts the judgment was manifestly for the right party.

It stands admitted, that defendant was at the time complained of a registered pharmacist and keeper of a drugstore, and at the same time that he was a registered practicing physician in Miller county. Defendant confesses to the sale of whiskey to the amount of four pints to one Sheppard, but attempts to justify such sale by producing at the trial a prescription which he says he made out himself at the time he sold the whiskey to Sheppard. Said prescription is in words and figures as follows:

"No. 370. St. Elizabeth, Mo., 8-25-90.
"For Jasper Sheppard.
"Rx. Spt. Frumenti oz. to be used as a medicine.
"P. T. Nixdorf, M. D."

Now the statute, the violation of which is charged on defendant, provides thus:

"Sec. 4621. No druggist, proprietor of a drugstore or pharmacist shall, directly or indirectly, sell, give away or otherwise dispose of alcohol or intoxicating liquors of any kind in any quantity less than four gallons, for any purpose, except on a written prescription, dated and signed, first had and obtained from a regular registered and practicing physician, and then only when such physician shall state in such prescription the name of the person for whom the same is prescribed, and *that such intoxicating liquor is prescribed as a necessary remedy*."

It is clear that the so-called prescription here offered by the defendant fails in an essential particular to fill the requirements of the foregoing statute. Before selling intoxicating liquors in less quantities than four gallons, the druggist or pharmacist must be advised by the certificate, or prescription of a regular registered physician that such intoxicant is a *needed remedy* for some ailment of the party seeking the purchase.

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The statute in effect uses the words that the liquor can only be sold in such cases where the physician in the writing shall state that the same is prescribed as a *necessary remedy.* It would be sufficient if the prescription contained this requirement in substance, but here the statement that the liquor is "*to be used as a medicine*" does not substantially comply with the demands of the statute. This law was intended to prevent the conversion of drugstores into non-license-paying dramshops. It intended the druggist to sell liquors as *remedies* for disease only; and, to hedge about and avoid as much as may be an abuse of the traffic, a condition to every sale was attached, that no druggist could sell except on a statement, upon the professional honor, of a regularly licensed and practicing physician that the liquor was a necessary remedy.

Whatever then may have been errors in giving instructions, the defendant was manifestly guilty of the offense charged, and as the jury fixed his punishment at the lowest prescribed by the statute, he has no cause to complain, and the judgment is affirmed. All concur.

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EDA HICKAM, Plaintiff in Error, v. JAMES HICKAM, Administrator, Defendant in Error.

Kansas City Court of Appeals, November 9, 1891.

1. **Quantum Meruit:** IMPLIED PROMISE IN THE ABSENCE OF INTENTION: DURESS OR FRAUD. The law implies from men's conduct and actions contracts and promises as forcible and binding as those made by express words, and such contracts are implied sometimes in the furtherance of the intention, or presumed intention, of the parties, and sometimes in furtherance of justice, without regard to the intention of the parties. And a promise to pay for services rendered or money obtained will be implied against the wrongdoer, who never intended to pay, or intended deceitfully to avoid payment; and whether labor is security through duress, compulsion or fraud can make no difference.

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2. ——— : ——— : IGNORANCE OF LAW : MAXIM : FRAUD : SLAVE. The maxim, *ignorantia legis neminem excusat*, is relaxed in cases of imposition, misrepresentation, undue influence, misplaced confidence and surprise; as if a girl born and raised a slave, ignorant, unable to read, and for a series of years kept under a strict surveillance and in utter ignorance of her emancipation and right to her own labor, and taught to believe she was still the property of her old master, should continue to work for her old master without intention to receive pay on her part, or to give on his part, her ignorance of her legal rights would not defeat her action for such work and labor brought after she learned of the fraudulent suppression.

3. ——— : ——— : GROUND OF RECOVERY : INSTRUCTIONS. In an action by such girl against her old master for services, she must recover, if at all, regardless of the intention of one or the other, for the reason, and that alone, that she was induced by the conduct of her old master to render services for him under the belief that she owed him such labor as his slave. Instructions set out in the opinion reviewed and criticised.

4. ——— : LIMITATION : FRAUD. Where a girl, born a slave, has by the fraudulent conduct of her old master been induced to continue to labor for him in ignorance of her rights for twenty-four years after her emancipation, the cause of action for such services, if any there is, accrues on the discovery of the fraud; her claim is an entirety for the whole, and the five years' limitation does not apply to bar all but the last five years' service.

Appeal from the Cooper Circuit Court.—HON. E. L. EDWARDS, Judge.

REVERSED AND REMANDED.

John Cosgrove and *J. H. Johnson*, for plaintiff in error.

(1) The trial court erred in refusing to instruct the jury as requested by the plaintiff. Where a person, under a mistake of fact, is induced by the fraud and concealment of another to perform for him valuable services, the law raises an obligation to pay what the services are reasonably worth, although when rendered there was no expectation that they should be paid for.

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Higgins v. Breen, 9 Mo. 497; *Boardman v. Ward*, 40 Minn. 399; 12 Am. State Rep. 749. "Where one compels another to render services for him, and such services are rendered under duress, or because of a mistaken understanding that they are legally due to the person for whom they are rendered, a recovery therefor may be had on a *quantum meruit.*" Wood on Master & Servant, sec. 684, notes; *Patterson v. Crawford*, 12 Ind. 241; *Black v. Meaux*, 4 Dana (Ky.) 188; *Jarrot v. Jarrot*, 2 Gilm. 111; *Peter v. Steel*, 3 Yeates (Penn.) 250. Where services are rendered and accepted, the presumption is that they were to be paid for, and the burden is upon the party receiving such services, to show that they were rendered under such circumstances that indicate that they were gratuitous. See authorities above cited.

Draffen & Williams, for defendant in error.

(1) Plaintiff's first instruction was properly refused. *First.* There was no evidence on which to base it. *Cottrell v. Spiess*, 23 Mo. App. 35; *Miller v. Railroad*, 90 Mo. 389; *Bean v. Railroad*, 20 Mo. App. 641; *Huff v. Morton*, 94 Mo. 405. The evidence excluded by the court, of course, cannot be considered in determining what instructions should have been given. *Cantwell v. Stephens*, 57 Mo. 589. *Second.* This instruction was further objectionable, because it singled out particular evidence, which, in any event, would not, of itself, have authorized a recovery, and gave it undue prominence. *Chouteau v. Iron Works*, 83 Mo. 73. *Third.* The instruction did not properly declare the law. There is no pretense, that the plaintiff was compelled to work for the deceased, nor is there any evidence that she acted under a mistake of fact. She is conclusively presumed to have known, that, under the law of the land, she was a free woman. "Ignorance of

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a material fact may excuse a party from the legal consequences of his conduct; but ignorance of the law, which every man is presumed to know, does not afford excuse." *Norton v. Highleyman*, 88 Mo. 625; Broom's Legal Maxims, p. 192; *White v. Collier*, 5 Mo. 32. *Fourth.* It is conceded, in this court, that the plaintiff did not expect to charge for her services at the time they were rendered, and that she was not entitled to recover upon the ground that she intended to charge and Hickam expected to pay therefor. She was, therefore, not injured by the refusal of her second and third instructions, submitting that issue, even if they had asserted a correct proposition of law. *Callahan v. Riggins*, 43 Mo. App. 130. (2) Where services are voluntarily rendered, under the belief that they are legally due, and not under any mistake of fact, and without any intention upon the part of the one performing them to charge therefor, or upon the part of the recipient of them to pay for same, the law will not imply a promise to pay for such services. *Maltby v. Harwood*, 12 Barb. 473; *Livingston v. Ackeston*, 5 Cowan, 530; *Griffin v. Potter*, 14 Wend. 209. (3) Defendant's second instruction is correct. The evidence in the case did not justify a finding for the plaintiff. The only ground upon which the plaintiff could have maintained such a suit was, that she was compelled to render services for the deceased, and that such services were rendered under duress, of which there is no evidence in this case. There was no mistake of fact, and no implied promise arising from circumstances showing an intention to charge; and the plaintiff could not recover, unless the evidence showed that she rendered the services sued for under compulsion. *Peter v. Steel*, *supra*; *Patterson v. Crawford*, 12 Ind. 241; *Jarrot v. Jarrot*, *supra*. (4) The defendant's sixth instruction becomes immaterial, as the finding was for the defendant. The instruction, however, correctly stated the law applicable to such claims as the one at

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bar. There was no open, mutual account between the parties. The rule contained in the instruction was held applicable to a suit for services in *Application of Gardner, Adm'r*, 5 Cent. Rep. 371; *Davis v. Gordon*, 16 N. Y. 225.

Gill, J.—At the December term, 1889, the plaintiff presented to the probate court of Cooper county, for allowance against the estate of Joseph Hickam, deceased, the following account:

"*The Estate of Joseph Hickam, deceased, To Eda Hickam (colored), Dr.:*

"To services rendered by said Eda Hickam for the said Joseph Hickam as house and general servant from the eighteenth day of February, 1865, to the twenty-third day of February, 1889, being twenty-four years and five days, at the rate of $5 per month, amounting in the aggregate to the sum of $1,440.85."

The case was tried before a jury in the probate court, and judgment rendered for the plaintiff for $785.29, from which the defendant appealed to the circuit court of Cooper county, where a trial was had before a jury, resulting in a verdict for the defendant, whereupon the plaintiff sued out her writ of error, and brought the case to this court. We make the following brief statement of the facts as set out in counsel's brief upon which plaintiff's demand is based:

Prior to the Civil War and up to the date of the emancipation of slaves in Missouri, the plaintiff was the property of Joseph Hickam, now deceased, who lived in Moniteau county, Missouri, from whence he removed to Cooper county, where he died in the year 1889. At the time of the abolition of slavery in Missouri the plaintiff was about twenty-three years old. From childhood she had been the slave of said Joseph Hickam; had no education, and had had very little intercourse with anyone outside of the family of her

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owner. She claims (and there is some evidence to sustain her) that during the war and until the death of her "old master," Joseph Hickam, she was not allowed to, and never did, leave his premises except in the company of a member of the Hickam family; that she was not allowed to visit any of her own race, and no colored person, not even her stepfather, was allowed to talk to her alone; that she was never permitted to go to church or public gatherings of any kind, and lived in absolute ignorance of the fact that the negroes had been set free, or that she was a free woman, until after the death of her master, Joseph Hickam. During the whole of the time, from the abolition of slavery in Missouri until the death of Joseph Hickam (twenty-four years and five days), she lived and served as his slave in total ignorance of her rights, and without any remuneration or reward for her services, except what she had received while she was in fact a slave, to-wit, her food and clothing. The theory upon which plaintiff's claim is based is, that if by fraud, deceit or duress she was kept in ignorance of her rights by the said Joseph Hickam, whereby she was induced to and did render him services, then she is entitled to pay for the same, although he may not have intended to pay her, and she may not have expected to charge for such services.

At the trial in the circuit court, plaintiff asked several instructions, all of which were refused. Among these so refused was the following: "1. If the jury believe from the evidence that prior to the emancipation of slaves in the state of Missouri, to-wit, the fourth day of July, 1865, the plaintiff was the slave of Joseph Hickam, deceased, and that after said date the plaintiff continued to live with the said Joseph Hickam, and worked for him and his family until the date of his death, to-wit, the twenty-third day of February, 1889; that during all that time she was prevented from associating with people of her color, and was kept in ignorance of the fact that the negroes had been freed, and

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that she was at liberty to leave if she wished, and that she was kept in such ignorance by said Joseph Hickam, for the purpose of retaining her services without pay, then you are instructed that she is entitled to receive for her said services such remuneration as you may believe, from all the evidence in the case, such services were worth, not exceeding the sum of $5 per month, with interest thereon at the rate of six per cent. per annum from the date of the presentation of said claim to the probate court of Cooper county, Missouri, to-wit, the ninth day of January, 1890."

Of the instructions given by the court at the request of the defendant, we call attention to the following: "3. The jury are instructed that there is no evidence in this case that there was an express contract between the plaintiff and Joseph Hickam for the payment of wages to her, and the sole and only issue submitted to the jury is whether or not there was any implied contract between the plaintiff and said Joseph Hickam. And although the jury may believe that the plaintiff continued to live with the said Joseph Hickam after she became free, and she rendered valuable and meritorious services, still, unless they further believe from the evidence that at the time she rendered the services she expected to charge wages therefor, and the said Joseph Hickam knew that she intended to make said charge, there can be no recovery in this case.

"4. The jury are instructed that even though they may believe that the plaintiff continued to live with and work in the family of the said Joseph Hickam after the legal emancipation of the slaves, and after she became free, and that she did this in ignorance of the enactment of the law making her a free woman, still this will not authorize a recovery against the said Joseph Hickam's estate in this case if the services were rendered without expectation upon her part of receiving wages therefor, and without the intention on his part of paying therefor.

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"5. The jury are instructed that, although they may believe that the plaintiff continued to live with Joseph Hickam, deceased, for twenty-four years after she became free, and that during that time she worked for, and rendered to him valuable services, still she cannot recover in this case, no matter how meritorious her services may have been, unless the jury shall believe from the evidence that at the time she was rendering said services she intended to charge Joseph Hickam therefor, and that said Joseph Hickam understood at the time said services were being rendered that she expected to make said charges, and the burden of showing that the services were rendered under the expectation on the part of the plaintiff of charging, and on the part of Joseph Hickam of paying therefor, is upon the plaintiff, and unless this proof has been made the finding must be for the defendant.

"6. The jury are instructed that the plaintiff cannot recover for any services rendered more than five years prior to the death of the said Joseph Hickam, as the right to recover for any services rendered more than five years prior to his death is barred by the statute of limitations."

I. It will be seen by a comparison of plaintiff's refused instruction with the instruction given for defendant, that the trial court declined to adopt the theory that if the negro girl, Eda, was induced by the fraudulent concealment of her rights by the said Joseph Hickam to labor for his benefit without pay, that then she ought to recover the value of such services; *but* held that the plaintiff could not recover, however valuable the services may have been, unless "the jury should believe from the evidence that at the time she was rendering said services she intended to charge Joseph Hickam therefor, and that the said Joseph Hickam understood at the time said services were being rendered that she expected to make said charge," etc. In other words, the jury was advised that, even admitting the

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charge that Joseph Hickam did by his fraudulent practices hold the said Eda in practical bondage years after the emancipation, and that, in utter ignorance that she was free, the plaintiff performed valuable labor for said Joseph Hickam, yet that there was no implied obligation on him to pay therefor, *because* she, the plaintiff, at the time expected no reward, nor did Hickam expect to pay anything therefor.

We do not understand this to be the law in this character of case. An implied promise does not always depend upon the existence of *intention in fact* of the one to pay and the other to receive. The law frequently affixes a promise to pay even contrary to actual intention. As well expressed by an eminent author: "The law implies from men's conduct and actions contracts and promises as forcible and binding as those made by express words, and such contracts are implied sometimes in furtherance of the intention, or presumed intention, of the parties, and *sometimes in furtherance of justice without regard to the intention of the parties.* Thus a promise to pay for services rendered, or for goods received, or money obtained, will be implied against the wrongdoer who never intended to pay or intended deceptively to avoid payment." 3 Add. on Cont., sec. 1399; 1 Hilliard on Contracts, sec. 20, p. 65.

This same doctrine found practical application in an early decision by our supreme court. *Higgins v. Breen, Adm'r*, 9 Mo. 497. McNally left his wife in a foreign country, came here and solicited the plaintiff, Rosaline Higgins, to marry him; she consented and was married to him, trusting to McNally's false and fraudulent representations that he was single. It was only after the death of McNally that the plaintiff became informed of the truth. She then sued the estate for the value of her services as housekeeper for McNally during the time she had lived with him, and she was allowed to recover, although, of course, while

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performing the services she in fact expected no compensation. Nor did McNally expect to pay anything. He was held, however, on an implied contract, regardless of the intention of the parties. In point see also, *Negro Peter v. Steel*, 3 Yeates (Pa.) 250; *Boardman v. Ward*, 40 Minn. 399; Wood on Master & Servant, pp. 96, 106, 107, and cases cited. Many of the cases referred to, it is true, were instances of *compulsion*, where the plaintiff was forced to labor for the defendant. However, I can discover no distinction in principle, whether the labor was secured through duress, compulsion or *fraud*. The reason and justice in each case is the same; the law is the same.

The authorities cited by defendant do not militate against the position here announced. The case of *Callahan v. Riggins*, 43 Mo. App. 130, is one of the series in the appellate courts of this state denying the right of a near relative and member of the family to compensation for labor done while a member of the family, unless there was at the time an expectation of the one to give, and the other to receive, pay for such services. It is there held that the ordinary presumption of an agreement to pay for valuable services rendered does not obtain where the parties occupy a family relation. These cases are taken out of the general rule, and have no bearing on the question here.

In *Maltby v. Harwood*, 12 Barb. 473, and other cases relied on by defendant's counsel, both parties were acting under a mistake. "They alike," says the court in *Maltby v. Harwood*, "thought the plaintiff was bound as an apprentice." It was held there that no implied obligation to pay arose. It is said there, however, that a different rule would hold if the plaintiff had been *compelled* to perform the labor for defendants. I take it the court in the *Maltby case* would have held the defendant liable on a showing that he had secured the services of the plaintiff by falsely and knowingly representing and inducing the plaintiff to believe that he,

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the defendant, was legally entitled to his labor thus performed.

II. But it is suggested by defendant's counsel that the ignorance, on account of which plaintiff seeks relief, is that of law and not of fact, and hence, under the well-known maxim, *Ignorantia legis neminem excusat*, she cannot complain of the deception alleged to have been practiced by Joseph Hickam. Generally, it is true, a misrepresentation of the law affords no ground of redress; the misrepresentation should relate to a question of fact. However, this harsh and arbitrary rule is not without its exception. All men are not always presumed to know the law. Misrepresentation of the law is sometimes binding on the party who makes it. This is true in transactions between parties occupying fiduciary and confidential relations. "Indeed," it is said, "where one who has had superior means of information professes a knowledge of the law, and thereby obtains an unconscionable advantage of another who is ignorant, and has not been in a situation to become informed, the injured party is entitled to relief as well as if the misrepresentation had been concerning matter of fact. Bigelow on Fraud, 488, and cases cited; *Moreland v. Atchison*, 19 Tex. 311. The right to relief seems to be admitted, where "a party should intentionally deceive another by misrepresenting the law to him, or, knowing him to be ignorant of it, should thereby knowingly take advantage of his ignorance for the purpose of deceiving him." *Abbott v. Treat*, 78 Me. 126. Says Judge NAPTON, in *Faust, Adm'r, v. Birner*, 30 Mo. at p. 420: "There may have been gross ignorance and imbecility on one side and a perfect knowledge of the fact and the law on the other; there may have been imposition or undue influence; there may have been circumstances from which the jury might infer fraud," and, therefore, he concluded that the plaintiff in the action might, on a new trial, recover.

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Justice STORY thus concludes a recital of exceptions to the above rule that there is no relief from an ignorance of the law. He says: "It is relaxed * * * in cases of imposition, misrepresentation, undue influence, misplaced confidence and surprise." 1 Story's Eq., sec. 137; also sec. 120, *et seq.* Conceding, now, for the purpose only of illustrating our contention, that the facts of this case are as put by plaintiff's counsel, that this negro girl was born and raised a slave, ignorant, unable to read, kept under strict surveillance by her master during and since the momentous year of 1865, and, up to his death in 1889, guarded by watchful eyes, kept within the precincts of the Hickam home and unadvised of the history of the times and the country, and taught to believe that she was still a slave and was the property of Hickam; that her old master kept her in darkness and absolute ignorance all these twenty-four years of the fact that she was free, what an outrage on justice would it be to answer her claim for compensation for valuable services to say to her: "You all the time knew the law of the land, and there is no relief for you." No; the plaintiff's case, as claimed by her, forms an exception to the rule, and, if Joseph Hickam was guilty of this fraudulent suppression of the truth and this misrepresentation to one under his care and control, he cannot be now heard to invoke the maxim of law above quoted.

III. We conclude, then, that the case in hand should have been submitted to the jury on the theory outlined in plaintiff's first instruction, and that the defendant's instructions (which were given and numbered 3, 4 and 5) incorrectly declared the law of this case, and should not have been given. We do not mean, however, to sanction the particular wording of plaintiff's first instruction. At another trial counsel should avoid calling attention to particular portions of the evidence, and thereby giving undue prominence to certain isolated testimony. Further, we must say that, in our opinion,

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plaintiff 's second and third instructions have no place in this case. As already held, in reference to defendant's instructions, the question of intention on plaintiff 's part to charge for services rendered is not to be considered; for, in this kind of case, there can in fact be no intention one way or the other. If plaintiff recover at all, it must be regardless of actual intention on the part of one or the other; it must be for the reason, and that alone, that she was fraudulently induced, by the conduct of Joseph Hickam, to render services for him under the belief that she, the plaintiff, owed him such labor as his slave. The case is thus narrowed to the one question, and it will only confuse the triers of the fact to inject other issues not pertinent.

IV. The trial court erred also in declaring to the jury that plaintiff could only recover, if at all, for the last five years' service. If she has any cause of action, it is for the whole term. Her claim is an entirety, good as to the whole, or bad as to the whole. The cause of action, if any there is, accrued on the discovery of the fraud in 1889. R. S. 1889, sec. 6775.

The judgment will be reversed, and the cause remanded for a new trial. All concur.

JOHN B. HALE, Respondent, v. THE SPRINGFIELD FIRE & MARINE INSURANCE COMPANY, Appellant.

Kansas City Court of Appeals, November 9, 1891.

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1. **Insurance:** CONSTRUCTION OF POLICY: PLATE-GLASS FRONT: DOORS AND WINDOWS. A clause in a tornado insurance policy provided that plate glass in doors and windows, the dimensions whereof are nine square feet or more, was not covered by insurance on the building, but must be separately and specifically insured. *Held*, that a plate-glass front which was immovable, and stationary, is covered by the policy, though the glass therein was of greater dimensions than nine feet.

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2. **Definitions:** WINDOWS. **A window is an aperture or opening in the wall of a building for the admission of light and air to the interior, and to enable those within to look out.**

3. **Insurance:** RULE AS TO THE CONSTRUCTION OF POLICY. **If there is a doubt in respect of the meaning of the terms of a clause of an insurance policy, that doubt must be resolved in favor of the interpretation of the assured, although intended otherwise by the insurer.**

Appeal from the Carroll Circuit Court.—HON. J. M. DAVIS, Judge.

AFFIRMED.

John L. Mirick, for appellant.

As the facts stand admitted, the only question presented is, as to the correctness of the finding of the court, that a plate-glass front in a building is not a window. This ruling, we insist, is contrary not only to the intentions of the parties as expressed in the policy, but is at variance with the common understanding of everyone. A window is defined to be, "An opening made in the wall of a house to admit light and air, and to enable those who are in to look out" (2 Bouvier Dict., p. 670), and the size of the opening does not change its character. The rule of construction is that words of common use are to be taken in their natural, plain, obvious and ordinary signification and import. The language of the exception in this policy is so plain that it can have but one meaning, and that is that plate glass of the dimension of nine square feet or more is not covered by the policy, no matter what position it may be in in the building; wherever used it will admit light and be a window. The term "plate-glass front" is only a phrase to indicate the kind of glass in the doors and windows of the front of a building.

J. W. Sebree and *A. H. Hale*, for respondent.

A window in ordinary transactions is understood to mean an opening in a building, filled with glass,

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intended for light and ventilation, and is movable or portable. Worcester's Dictionary, page 1673, who defines it as follows: "An aperture in the wall of a building for the admission of light and air to the interior and to enable those within to look out." Webster gives substantially the same definition: "An opening in the wall of a building for the admission of light and air when necessary." In this case the statement shows that the glass injured was part of the front of a building—was immovable—and was what is known as a plate-glass front. It had but one of the uses or elements of a window. It afforded light to the building, but could not be used for ventilation. It is a familiar rule in construing contracts that they be taken most strongly against the obligor. In the case of *Ins. Co. v. Wiler*, 100 Ind. 92, the court says: "If a question in the application is ambiguous, or can be answered in more than one way, it should be construed most strongly against the insurer, and all doubts should be resolved in favor of the insured." We submit that the same rule should be applied to words contained in the policy. *LaForce v. Ins. Co.*, 43 Mo. App. 530; *Hoffman v. Ins. Co.*, 32 N. Y. 405; *Reynolds v. Ins. Co.*, 47 N. Y. 597; 1 Wood on Fire Ins. [2 Ed.] sec. 60; May on Insurance [2 Ed.] sec. 175.

SMITH, P. J.—The single question arising on the record in this case is, whether the loss, caused by a wind storm, of a pane of plate glass, nine feet square, in the front of a store building is covered by the terms of a clause in a tornado insurance policy which provides that, "Plate glass in doors and windows, whereof the dimensions are nine feet or more, * * * are not covered by insurance on the building, but must be separately and specifically insured."

A window is defined, by standard lexicographers, to be an aperture or opening in the wall of a building for the admission of light and air to the interior, and to

enable those within to look out. Worcester's Dict. 1673; Bouvier's Dict. 670. The plaintiff contends that, since the glass injured was part of the front of the building, a plate-glass front which was immovable and stationary, had but one of the qualities of a window, *i. e.*, that of admitting light into the building, but not for ventilation; that it does not, therefore, fulfill the definition of a window. It is a matter of common information that glass enters almost as extensively into the construction of modern buildings as stone, wood, iron, etc. Its use is not so restricted in modern architecture as formerly. There are to be found in almost any American city houses, into the structure of which glass so largely enters, that they might without impropriety be characterized as "glass houses." These considerations would indicate that the clause in question is at least susceptible of the interpretation claimed by the assured. And the rule of construction in such cases is, that, if there is a doubt in respect to the meaning of the terms of a clause of an insurance policy, that doubt must be resolved in favor of the interpretation of the assured, although intended otherwise by the insurer. *LaForce v. Ins. Co.*, 43 Mo. App. 530; *Hoffman v. Ins. Co.*, 32 N. Y. 405; *Reynolds v. Ins. Co.*, 47 N. Y. 597; 1 Wood on Fire Ins. [2 Ed.] sec. 60; May on Ins. [2 Ed.] sec. 175.

The question stated at the outset must be answered in the affirmative.

The judgment must be affirmed. All concur.

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E. M. RIDDLE, Appellant, v. W. B. NORRIS, Assignee, *et al.*, Respondents.

Kansas City Court of Appeals, November 9, 1891.

1. **Chattel Mortgage**: INDORSEMENT OF, ON NOTE GOOD BETWEEN THE PARTIES: AGREEMENT TO MAKE: CONSTRUCTION. The following indorsement on a note: "As security for the within note I hereby mortgage and pledge to McD., or order, all my art store stock, etc., and agree at any time to make a chattel mortgage of same," is *held* a good mortgage between the parties, and the agreement "to make a chattel mortgage" is *held* to mean a formal mortgage for record to be good against the world.

2. **Assignment**: ASSIGNEE CANNOT DEFEND AGAINST ASSIGNOR'S MORTGAGE. An assignee for the benefit of creditors cannot defend against his assignor's mortgage on the ground that it is fraudulent and void as to creditors. (*Following Jacobi v. Jacobi*, 101 Mo. 507.)

3. ——: ——. (*Hughes v. Menefee*, 29 Mo. App. 192, *distinguished.*)

Appeal from the Buchanan Circuit Court.—HON. HENRY M. RAMEY, Judge.

REVERSED AND REMANDED.

Jas. F. Pitt, for appellant.

(1) "As security for the within note I hereby mortgage and pledge," are apt words of conveyance. They indicate the nature and intention of the instrument as plainly as if written out in the most formal language. "To mortgage" means to convey with a defeasance. The purpose was expressed. The use of the word "pledge" in this connection gave the right to immediate possession. *Bascom v. Rainwater*, 30 Mo. App. 483; Jones on Chattel Mortgages, secs. 1, 4, 12, 14. (2) The covenant for a "chattel mortgage," a

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formally drawn and acknowledged instrument, does not affect the validity of the deed. In view of the law upon this subject, and the situation of the parties, this covenant was specially appropriate. It required more formality to make this same title good as against third parties. Abbott's Law Dictionary, Title "Assure."

Stauber & Crandall, *J. M. Wilson* and *W. B. Norris*, for respondents.

The court rightfully refused to declare foreclosure in this case. *First.* Because there was no mortgage to foreclose; the indorsement on the note does not constitute a mortgage any more than it does a pledge, and what was intended by the parties is expressed in the last clause where Allen agrees to make a chattel mortgage some time in the future; and in the testimony of McDonald, who testifies that he wanted a chattel mortgage, but Allen refused to give him one. Even if the words used constituted an equitable mortgage it would not avail appellant in this proceeding at law. Jones' Chattel Mortgages, secs. 3, 10, 18, 34; *Mason v. Bernard*, 36 Mo. 384. *Second.* The assignee, while he takes subject to existing equities, is also the representative of the creditors, and can successfully resist the claim of appellant, who stands on an instrument void by the statute of this state because not recorded, and no change of possession. R. S., sec. 5176; *Hughes v. Menefee*, 29 Mo. App. 200; Jones' Chattel Mortgages, sec. 314, and cases cited.

Ellison, J.—This action is based upon the following instrument and indorsement thereon:

"$575. St. Joseph, Mo., September 28, 1889.

"One day after date, I, the maker of this note, promise to pay to S. McDonald, Jr., or order, $575, for value received, negotiable and payable at the State Savings Bank in St. Joseph, Missouri, without defalcation or discount, with ten-per-cent. interest per annum

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after date until paid; the interest, if not paid annually, to become part of the principal and bear the same rate of interest.

"[Signed] THOMAS ALLEN.

"First indorsement: As security for the within note I hereby mortgage and pledge to S. McDonald, Jr., or order, all my art store stock, including easels, chairs, mitre, etc., moldings and pictures of all kinds. And agree at any time to make a chattel mortgage of same to him or order at any time hereafter of all the above. Now in Y. M. C. A. room on corner of Seventh and Felix streets, St. Joseph, Missouri.

"[Signed] THOMAS ALLEN.

"Second indorsement: Pay to the order of E. M. Riddle.

"S. McDONALD, JR.,

"(Without recourse)."

It is sought to obtain judgment on the note as well as of foreclosure of the alleged mortgage contained in the indorsement.

There was no change of possession of the goods. Riddle is the indorsee of McDonald, the payee of the note. Allen, the maker of the instrument, made a general assignment, for the benefits of his creditors to defendant Norris, who is now in possession of the goods in controversy, and the other defendants are general creditors of Allen, made parties on their own motion. Judgment was given for the note, but against the mortgage. The court, as the record states, "refused a decree for foreclosure because the above indorsement declared on as a mortgage was not in terms a mortgage, and under the evidence the instrument did not constitute a mortgage in law."

I. We are of the opinion that the instrument is sufficient to constitute a subsisting valid mortgage between the parties thereto. It discloses that it is for the purpose of securing the note and it has words sufficiently apt to show that a conveyance for that purpose

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was intended. That portion stating an agreement to make a chattel mortgage can well be held to mean that a formal mortgage for record, which would be good against the world, would thereafter be executed.

The mortgage not being acknowledged or recorded is void as to creditors, and this brings us to another branch of the case. Norris is the assignee under the statute of this state, and the question is, can he defend against the mortgage of the assignor on the ground that it is fraudulent and void as to creditors? Under authority of the case of *Jacobi v. Jacobi*, 101 Mo. 507, we must hold that he cannot.

Defendant cites us to the case of *Hughes v. Menefee*, 29 Mo. App. 192. That case is not like this, though a similar chain of reasoning can be applied to this case as to that. But that case was where it was held that an administrator of an insolvent estate could defend against the mortgage void as to the creditors of the estate, though it might be good as between the parties. In support of that case, see *Kilbourne v. Fay*, 29 Ohio St. 264, and authorities cited.

The judgment must be reversed, and the cause remanded. All concur.

THE STATE OF MISSOURI, Respondent, v. HENRY L. GOOD, Appellant.

Kansas City Court of Appeals, November 9, 1891.

Criminal Law: TRIAL: OTHER OFFENSES. On the trial of an indictment for abandoning his wife, it is error to advise the jury that defendant had on a prior occasion been indicted for seduction under promise of marriage, etc.

Appeal from the Cooper Circuit Court.—HON. E. L. EDWARDS, Judge.

REVERSED AND REMANDED.

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John Cosgrove, *J. H. Johnson* and *Draffen & Williams*, for appellant.

(1) It has been expressly held, that testimony as to a former prosecution of defendant for seduction of the woman, whom he subsequently married, was inadmissible, where defendant was upon trial for wife abandonment. The admission of such evidence was declared erroneous, and ground for reversal. "It was a matter wholly distinct from, and independent of, any connection with, the present charge." Testimony relating to a former prosecution for seduction was held not admissible on any grounds. *State v. Wonderly*, 17 Mo. App. 597. (2) It was reversible error for the prosecuting attorney in his opening statement to detail facts, that were incompetent, and could not be proved on the trial. His reference, over the objection of the defendant, and without rebuke from the court, to the fact, that the defendant had been indicted and tried for the seduction, and that this case originated out of that, was prejudicial error. 1 Thompson on Trials, secs. 263, 264, 266; Wharton's Criminal Pleading & Practice [8 Ed.] sec. 560.

E. D. Shackelford, for respondent.

It devolved upon the state to show, not only that the defendant had abandoned his wife, but that he had done so without good cause. In order to do this, it was necessary and competent to inquire into all the circumstances connected with the abandonment. If the defendant married his wife to avoid the penalties of a criminal seduction, and had it in his mind at the time to abandon her afterward, and did afterward, within seven weeks, abandon her, in accordance with the intent he had at the time of the marriage, it would be competent for the state to show it. The case of *State v. Wonderly*, 17 Mo. App. 597, relied upon by counsel for the defendant, does not militate against this position.

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In that case the court did not hold that, as a general rule, such evidence was incompetent; but, in that case, it had the exceptional effect of causing the jury to inflict an exorbitant punishment.

Gill, J.—Defendant was indicted for abandoning and failing, neglecting and refusing to support his wife and infant child. On a trial before jury he was convicted, and his punishment fixed at six months' imprisonment in the county jail and a fine of $500, as provided for in section 3501, Revised Statutes, 1889. The defendant appealed.

A review of this record forces us to conclude that defendant did not have that fair and impartial trial to which he is entitled under the law. In the course of the trial, and in the presence of the jury, the state was, over defendant's objections, allowed repeatedly to advise the jury that defendant had on a prior occasion been indicted for seduction under promise of marriage, etc. Such matter had nothing to do with the offense here charged, was foreign to the issues made, and its introduction only tended to prejudice the jury. Wharton's Crim. Pl. & Pr., sec. 560; 1 Thompson on Trials, secs. 263, etc.; *State v. Wonderly*, 17 Mo. App. 597.

Judgment reversed, and cause remanded. All concur.

T. J. Hill, Respondent, v. The Missouri Pacific Railway Company, Appellant.

Kansas City Court of Appeals, November 9, 1891.

Common Carriers: LIABILITIES BEYOND ITS LINE: STATUTE. Under section 944, Revised Statutes, 1889, a railway carrier, receiving goods in this state to be shipped over its own and connecting lines to the point of destination, may stipulate in the contract of shipment against damages to the goods occasioned by the negligence of the connecting carrier. The opinion follows *Dimmitt v. Railroad*, 103 Mo. 433, and discusses prior cases overruled thereby.

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Appeal from the Cass Circuit Court.—HON. CHAS. W. SLOAN, Judge.

REVERSED.

R. T. Railey, for appellant.

Our appellate courts having followed "the American doctrine," and the legislature, desiring that the English doctrine should become the law of this state, in 1879, adopted section 598 of Revised Statutes, 1879. R. S. 1889, sec. 944. It has been held that said statutes have no other effect than to adopt in this state the "English rule." *Dimmitt v. Railroad*, 15 S. W. Rep. (Mo.) 762, 763. The English rule simply presents a *prima facie* case, in the absence of an express contract. Under this rule, the right of defendant as a common carrier to limit its liability to its own line is clearly recognized. *Dimmitt v. Railroad*, *supra*, 762-3; Lawson on Carriers, sec. 239; *Jones v. Railroad*, 89 Ala. 376; s. c., 45 Am. & Eng. R. R. Cases, 322, and cases cited; *Falvey v. Railroad*, 76 Ga. 597; *Hunter v. Railroad*, 42 Am. & Eng. R. R. Cases (Texas) 502; *Railroad v. Baird*, 12 S. W. Rep. (Texas) 532; *Railroad v. Wynn*, 45 Am. & Eng. R. R. Cases (Tenn.) 315, and cases cited; *Ball v. Railroad*, 83 Mo. 580.

H. A. Jones and *Whitsitt & Jarrott*, for respondent.

(1) The law in this state is, that where a common carrier receives goods or live stock to be transported to a point beyond the terminus of his own line, and expressly or impliedly contracts for a through shipment, such receiving carrier is liable for any negligent injury to any such goods or live stock, whether occasioned upon his own line, or upon that of a connecting carrier over which said stock passes during such transportation. R. S. 1889, sec. 944; *Heil v. Railroad*, 16

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Mo. App. 363, 368; *Orr v. Railroad*, 21 Mo. App. 336; *Baker v. Railroad*, 34 Mo. App. 112; *Dimmitt v. Railroad*, 15 S. W. Rep. (Mo.) 763; 2 Rorer on Railroads, sec. 6, p. 1234. Where there is a contract of through shipment (as in this case), the receiving carrier cannot by special contract exempt itself from liability from injuries occurring on connecting lines. *Craycroft v. Railroad*, 18 Mo. App. 488, 495, 496, and authorities *supra; Railroad v. Vaughn*, 16 S. W. Rep. (Tex.) 775; *Bank v. Express Co.*, 93 U. S. 174; Lawson on Carriers, sec. 235. Defendant having made a contract of through shipment was bound to transport the stock to the terminus of its own line, and beyond its own line furnish transportation through other lines. *Railroad v. Williams*, 13 S. W. Rep. (Tex.) 639. The connecting lines so furnished or employed are agents of defendant for such transportation, and the defendant is liable for the injuries occurring on such line through the negligence of agents of such connecting lines. Authorities, *supra; Halliday v. Railroad*, 74 Mo. 162; *Railroad v. Vandeventer*, 41 N. W. Rep. (Neb.) 998.

SMITH, P. J.—The petition alleged that the defendant was a common carrier, for hire, of live stock between Pleasant Hill, Missouri, and Shreveport, Louisiana; that defendant employed connecting lines to transfer said stock between said points; that, on the date aforesaid, plaintiff delivered to defendant at Pleasant Hill, Missouri, forty-five mules and three horses belonging to him; that defendant agreed to transport same to Shreveport, Louisiana, and deliver them to him; that said stock was loaded into two of defendant's cars, marked M. P. 6273, and M. P. 6460; that said stock was in good condition when delivered to defendant at Pleasant Hill; that, through the carelessness of defendant, three of said mules were injured, and one of the three died from the effects of said injuries; that said mules were injured by the carelessness and negligence of defendant

in jerking, jamming, starting and suddenly stopping the freight train in which they were being transported; that plaintiff has sustained damage by reason thereof in the sum of $205, and for which with cost he prayed judgment.

The answer was a general denial coupled with several special defenses therein pleaded one of which was to the effect that said mules were injured between Chetopa, Kansas, and Shreveport, Louisiana, and after they had been turned over by defendant, in good condition, to the Missouri, Kansas & Texas Railroad Company, or the receivers thereof, at said town of Chetopa; that defendant ceased to have any further control over said stock after it left defendant's line at Chetopa aforesaid; that said stock passed through the hands of several connecting carriers before arriving at Shreveport aforesaid; that said mules were not injured by the fault or negligence of defendant; that the plaintiff and defendant entered into a written contract respecting the transportation of said mules, and that among other things said contract provided as follows: "And it is further stipulated and agreed between the parties hereto, that, in case the live stock mentioned herein is to be transported over the road or roads of any other railroad company, the said party of the first part shall be released from liability of every kind after said live stock shall have left its road; and the party of the second part hereby so expressly stipulates and agrees, the understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything beyond the line of the Missouri Pacific Railway Company, excepting to protect the through rate of freight named herein."

The replication admitted the execution of the contract, as alleged in the answer, and that the injury to the mules of which complaint was made occurred while the stock was *en route* of shipment between Chetopa, Kansas, and Shreveport, Louisiana.

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There was evidence introduced by the plaintiff tending to sustain the allegations in his petition. The defendant read in evidence the following stipulation: "It is further agreed that none of the animals belonging to plaintiff, as set forth in his petition, were injured while on the line of defendant's road, but were injured between Chetopa, Kansas, and Shreveport, Louisiana; that all said animals were turned over by defendant at Chetopa, Kansas, aforesaid, in good condition, to the Missouri, Kansas & Texas Railway Company, or the receivers of said company." At the close of all the evidence the defendant interposed a demurrer thereto, which was overruled. The plaintiff had judgment, and defendant appealed.

We had supposed, until the decision of the supreme court of this state in *Dimmitt v. Railroad*, 103 Mo. 433, which we shall notice further on, that it was well settled in this state that when a common carrier receives goods or live stock to be transported to a point beyond the terminus of its own line, and expressly or impliedly contracts for a through shipment, such receiving carrier is liable for any negligent injury to any such goods or live stock, whether occasioned on its own line or upon that of a connecting carrier over whose line such goods or live stock passed while on the way to the terminal point (R. S. 1889, sec. 944; *Heil v. Railroad*, 16 Mo. App. 363, 368; *Orr v. Railroad*, 21 Mo. App. 336; *Baker v. Railroad*, 34 Mo. App. 112), and that in contracts of through shipment a receiving carrier is not permitted by special stipulation to exempt itself from liability for negligent injuries occurring to the subject-matter of the shipment on connecting lines. *Heil v. Railroad, supra; Craycroft v. Railroad*, 18 Mo. App. 488; *Orr v. Railroad, supra; Baker v. Railroad*, 34 Mo. App. 99, 112.

The case of *Dimmitt v. Railroad, supra*, was where the plaintiff delivered to the defendant at the

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city of St. Joseph, in this state, a box containing six thousand cigars, marked and consigned to McAlier, at Deadwood, Dakota, to be carried and delivered to him there. The defendant received the box and delivered to plaintiff a bill of lading which provided, amongst other things, that the box was to be delivered without unnecessary delay at Omaha Station, to the consignee, or owner, or to such company or carrier as per marks and directions, in margin; and on the margin of which was written a description of the box, the name of the consignees, with the point of consignment. The defendant delivered the box to the connecting carrier at Omaha. It was never delivered by the connecting carrier, the Chicago & Northwestern Railway Company at the place of consignment. The box being lost the plaintiff sued the defendant, the receiving carrier, for its value. The instruction complained of in the case was to the effect that, if the loss was occasioned solely by the negligence of the connecting carrier, the plaintiff ought to recover. Mr. Justice BRACE, who delivered the opinion, remarked: "That the decision of the trial court involves the proper construction of section 598, Revised Statutes, 1879; Revised Statutes, 1889, section 944. * * * In order to determine whether it is obnoxious to any constitutional inhibition, state or national, it becomes necessary first to *ascertain its true scope and meaning*. At the time of its enactment, the law was as well settled as now that a common carrier may *contract* to carry to a place beyond the terminus of his route, and thereby render himself liable as such for the whole distance, but that he is not *required* by law to transport beyond his own line, and, therefore, may stipulate that he shall not be liable except for such loss or damage as may occur on his own route. While there was a universal consensus of opinion upon these propositions, there was a diversity of opinion as to what should be evidence of a contract for through carriage when no special contract was made; the English

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courts and the courts of some of the states holding that, 'where a common carrier takes into his care a parcel directed to a particular place, and does not, by positive agreement, limit his responsibility to a part only of the distance, it is *prima facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed,' although such place was beyond the terminus of his own route. Lawson on Carriers, sec. 239. The majority of the American courts, however, holding 'that where a carrier receives goods marked for a particular destination, beyond the route for which he professes to carry, and beyond the terminus of his road, he is only bound to transport and deliver them according to the established usage of his business, and is not liable for losses beyond his own line.' Lawson on Carriers, sec. 240. In 1870, this court in the case of *Coates v. Express Co.*, 45 Mo. 238, adopted what may be called the American doctrine on this subject, quoting with approval the language following of Prof. Parsons, formulating the rule: 'The prevailing rule in this country may now be said to cast upon the carrier no responsibility as a carrier beyond his own route. * * * Unless the usage of the business or of the carrier, or his conduct or language, shows that he takes the parcel as carrier for the whole route.' This ruling was followed in *Snider v. Express Co.*, 63 Mo. 376, decided in 1876. The consideration given by the supreme court to this question, and the conclusion reached by it so recently before this enactment, when taken in connection with the terms employed in the statute itself, leaves little room for doubt that the purpose of the legislature was to prescribe a definite rule of liability for negligence of a common carrier in harmony with what has been denominated 'the English rule' upon the subject. Whereby such carrier, when he receives a parcel to be transported to a place beyond the terminus of his route, is to be held liable as such to the place of destination,

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in the absence of a specific contract to carry such parcel only to the terminus of his own route, or limiting his liability to loss or damage occurring on his own route. The enactment as thus construed becomes a rule of evidence by which to determine what the contract of the carrier is in the absence of a specific one in a given case, operates with no undue hardship upon the carrier, and is violative of none of his rights, constitutional or otherwise. By its provisions the act of an acceptance by a common carrier of property to be transferred to a place beyond the terminus of his route is evidence of a contract to carry such property to the place of its destination. The act of issuing a receipt or bill of lading for property to be transferred to a place beyond the terminus of the route of a common carrier is evidence of a contract by such carrier to carry such property to the place of its destination. This *prima facie* case the statute makes for the plaintiff on the facts stated. In order to defeat it, the defendant must show, that, by specific agreement, it only contracted to carry the property to the terminus of its own line, or what is equivalent, that there was a specific agreement that it was to be liable only for loss or damage occurring on its own line."

This case clearly and unequivocally decides that a railway carrier, receiving goods in this state to be shipped over its own and connecting lines to the point of destination, may stipulate in the contract of shipment against damages to the goods occasioned by the negligence of the connecting carrier. It will not do to say that what is said by Judge BRACE in his opinion is *obiter dicta*, because he declares at the very outset of the opinion that "it becomes *necessary to ascertain the true scope and meaning of the statute.*" There can be no misunderstanding of his interpretation of its provisions.

Our own convictions must give way before this authoritative exposition of the statute, whose effect is

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to overthrow and brush away the unbroken line of appellate court decisions in this state, without so much as a bare reference to it. It is quite obvious that, under the statute as expounded and construed by the supreme court, the defendant had the right by contract to limit its liability to its own lines. Upon the undisputed facts in this case the plaintiff was not entitled to recover, and hence the circuit court erred in overruling the defendant's demurrer.

There are a number of other points to which our attention is called in the briefs of counsel, but, in the view which we have been obliged to take of the case, it is unnecessary to notice them. The judgment of the circuit court will be reversed. All concur.

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THE STATE OF MISSOURI, Respondent, v. JOHN H. KEITH, Appellant.

Kansas City Court of Appeals, November 9, 1891.

1. **Criminal Law:** NO ABETTOR IN SELLING LIQUOR. In misdemeanors of the class to which liquor-selling belongs, there are no aiders or abettors.

2. ——— : AIDERS AND ABETTORS : STATUTE : CONSTRUCTION. If the statute limit the penalty to those who participate, or its terms are general. or the offense of minor turpitude, its operation will be limited to those who are more particularly within the reason of the express words of the enactment.

3. ——— : SELLING LIQUOR : ABETTOR. Though an agent or servant of the owner becomes liable by selling liquor, yet if defendant was not the owner, agent or servant of the owner, but, merely at his request, set out the glass into which the liquor was poured, and from which it was drunk, he is not guilty of selling.

Appeal from the LaFayette Criminal Court.—HON. JOHN E. RYLAND, Judge.

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REVERSED AND REMANDED.

William Aull, for appellant.

(1) The statute does not extend the penal consequences to aiders and abettors. R. S. 1889, secs. 4570, 4583, p. 1044; *Commonwealth v. Willard*, 22 Pick. (Mass.) 476; *Frey v. Commonwealth*, 83 Ky. 190; *Commonwealth v. Williams*, 4 Allen, 587; *Hill v. Spear*, 50 N. H. 253; *Harney v. State*, 8 Lea, 113; Whart. Crim. Law [7 Ed.] sec. 120. (2) Even if aiders and abettors were covered by the statute to constitute them aiders and abettors, the act must have been knowingly done. *Village of St. Johnsbury v. Thompson*, 9 Vt. 571; *Crowell v. State*, 6 S. W. Rep. (Tex.) 318; *Goins v. State*, 21 N. E. Rep. (Ohio) 476; *State v. Fry*, 40 Kan. 311; 1 Whart. Crim. Law [7 Ed.] sec. 120; 1 Bish. Crim. Law, 658, and note; 1 Bish. Crim. Proc. [2 Ed.] 1024; *Green v. State*, 13 Mo. 382; *State v. Hollenscheit*, 61 Mo. 303; *State v. Cox*, 65 Mo. 29; *Commonwealth v. Williams*, 4 Allen, 587. (3) The court erred in refusing instructions asked by appellant. Could the mere act of setting the glass on the counter constitute a sale or a crime?

ELLISON, J.—The defendant was indicted for selling liquor in less quantities than one gallon, without having a dramshop keeper's license, or other legal authority so to do. He was convicted, and he prosecutes this appeal. The evidence not showing in an altogether satisfactory manner that the defendant had made the sale, the court, at the instance of the state, gave an instruction directing the jury to find the defendant guilty if he "was present aiding, assisting, abetting, countenancing or in anywise encouraging the making of such sale." This was error. In misdemeanors of the class to which liquor-selling belongs, there are no aiders or abettors. A buyer of liquor certainly

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aids, countenances, assists and encourages a sale; yet, it would hardly be pretended that he would be liable to punishment under the dramshop law.

"If the terms of a statute distinctly limit the penalty to persons who participate in the act only in a certain way, those terms furnish the rule of the court. Or, if the expression be general, but the offense is of minor turpitude, and especially if it be only *malum prohibitum*, the courts, by construction, will limit its operation to those persons who are more particularly within the reason of the express words of the enactment." 1 Bish. Crim. Law, sec. 657. Following this principle, it has been held that the purchaser is not liable to punishment, either upon the theory of being a principal or an enticer, aider or abettor. *Harvey v. State*, 7 Lea, 113; *Commonwealth v. Willard*, 22 Pick. 476. However, if one, himself, makes a sale, he is liable whether he be owner, agent or servant of the owner, and whether he be acting with or without compensation. But, in this case the evidence calls upon us to make this additional remark: If the defendant was not the owner, or the agent or servant of the owner but merely, at the owner's request, set out the glass into which the liquor was poured, and from which it was drunk, he is not guilty of selling.

Judgment reversed and cause remanded. All concur.

THE STATE OF MISSOURI, Appellant, v. JOHN GRAHAM, Respondent. 46 527 158s 73

Kansas City Court of Appeals, November 9, 1891.

Criminal Law: INFORMATION: VERIFICATION OF. An information in the criminal court of LaFayette county is sufficiently verified by the affidavit of the prosecuting attorney to his best information and belief.

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Appeal from the LaFayette Criminal Court.—Hon. John E. Ryland, Judge.

Reversed and remanded.

William Aull, for appellant.

(1) The prosecuting officer is not required to have personal knowledge of the offense charged. *State v. Ransbarger*, 42 Mo. App. 466; *State v. Fletchall*, 31 Mo. App. 296; R. S. 1889, secs. 4057-9; R. S. 1879, secs. 1762-3. (2) The information of the common law is the information prescribed by the constitution and authorized by the legislature. R. S. 1889, *supra; State v. Kehn*, 79 Mo. 515; *State v. Briscoe*, 80 Mo. 643; *State v. Russell*, 88 Mo. 649; *State v. Fletchall, supra; Ex parte Slater*, 72 Mo. 102. (3) The power of the prosecuting officer remains as at common law. *State v. Ransbarger, supra;* Wharton's Crim. Law, 213; 1 Chitty, Crim. Law, 445-6; 4 Blackstone, 308-12; 1 Bishop Crim. Proc., secs. 143-146; *State v. Kehn*, 79 Mo. 515; *State v. Dover*, 9 N. H. 408; *Ex parte Slater*, 72 Mo. 102.

Smith, P. J.—This was an information filed by the prosecuting attorney in the criminal court of LaFayette county, charging the defendant with the unlawful selling of intoxicating liquors in less quantities than one gallon without having a license as a dramshop keeper or any other legal authority so to do. The information contained two counts, to which was appended an affidavit of the prosecuting attorney, wherein it was stated that the facts "in the foregoing information are true according to his best information and belief." This information on the motion of the defendant was quashed in the court below, and judgment was rendered accordingly. The state is the appellant here. The information, according to the ruling made in the following

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named cases, is bad: *State v. Humble*, 34 Mo. App. 343; *State v. Wilkson*, 36 Mo. App. 373; *State v. Hatfield*, 40 Mo. App. 358; *State v. Buck*, 43 Mo. App. 443. But according to that made in *State v. Ransbarger*, 42 Mo. App. 466, it is sufficient.

The last-named case was certified to the supreme court where it was decided that no constitutional question arose in the case, and that "the information in this case conforms to the requirement of the statutes." We may infer from this that the concurrent rulings made in the first four named cases were intended thereby to be overthrown. If we are correct in our inference it must follow that the judgment of the criminal court should be reversed, and the cause remanded for trial upon the information, which is accordingly ordered. All concur.

SAMUEL P. SPARKS, Appellant, v. ISAAC BROWN *et al.*, Respondents.

Kansas City Court of Appeals, November 9, 1891.

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64	189
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74	443

1. **Chattel Mortgages:** CONSIDERATION SHOWN BY PAROL. Parol evidence is admissible to show the purpose and intent for which a mortgage was executed, though upon its face it should appear to be for the payment of a specified sum of money. This is the general American doctrine, and is the rule in this state in equity and at law.

2. **Evidence:** ACTS AND ADMISSIONS OF GRANTOR. An assignor or grantor can do no act, nor make any admission subsequently to the assignment or grant, to impeach or impair the title of his assignee or grantee.

3. ——— : CHATTEL MORTGAGE: DESCRIPTION: "BAY": "MOUSE-COLORED": "BROWN": "LIGHT BROWN": PAROL. The pleadings described certain mules as "mouse-colored" and "bay." A chattel mortgage relied upon in evidence described them as "brown" and "light brown." *Held*, that the descriptions, on their face, were

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different and the terms not interchangeable, and the admission of the mortgage in evidence error, yet it was cured by subsequent parol evidence that these descriptive terms are used interchangeably and synonymously among farmers and stockmen.

4. **Chattel Mortgage:** FRAUDULENT CONDUCT OF MORTGAGEE: SECOND MORTGAGEE: INSTRUCTION. A prior mortgagee's mortgage covered all the mortgagor's property. Subsequently to the giving of a second mortgage on part of the same property, the mortgagee permitted the mortgagor to remain in possession and dispose of the property and apply the proceeds to his own use. *Held*, such conduct rendered the prior mortgage fraudulent as to the second mortgagee, and an instruction to that effect is approved.

5. ——— : FRAUD : KNOWLEDGE OF : INSTRUCTIONS WITHOUT EVIDENCE. An instruction should not be given when there is no evidence on which to base it: and, where a mortgagee pursues his legal remedy to obtain possession of the mortgaged property, no inference can arise from that fact alone that it was his intention thereby to aid the mortgagor to defraud a prior mortgagee, without some proof of his knowledge of such fraudulent intention.

Appeal from the Johnson Circuit Court.—HON. CHAS. W. SLOAN, Judge.

REVERSED AND REMANDED.

A. B. Logan and *W. W. Wood*, for appellant.

(1) The admission of parol evidence to contradict and vary the express terms of the Brown mortgage in this action at law was erroneous, and in direct conflict with every adjudication on the question by the appellate courts of this state. *Miller v. Dunlap*, 22 Mo. App. 97; *Jones v. Shepley*, 90 Mo. 307; *Ins. Co. v. Mowry*, 6 Otto, 544; *Corrigan v. Tiernay*, 100 Mo. 276; *Hogel v. Lindell*, 10 Mo. 493; *Montaney v. Rock*, 10 Mo. 56; *Kuntz v. Temple*, 43 Mo. 71; *Koehring v. Muemminghoff*, 61 Mo. 403; 8 Cent. Law Jour., pp. 162, 222, 210; *State to use v. Koch*, 40 Mo. App. 635, *loc. cit.* 640; *Henderson v. Henderson*, 13 Mo. 151; *Simons v. Beauchamp*, 1 Mo. 589; *Johnson v. Houston*, 17 Mo. 58; *Jones v. Jeffries*, 17 Mo. 577; *Benson v. Harrison*,

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39 Mo. 303; *Mossmann v. Halscher*, 49 Mo. 87; *Weil v. Tyler*, 33 Mo. 558; *Perry v. Siter*, 37 Mo. 279; *McConnell v. Brainer*, 63 Mo. 461; Jones, Chat. Mort., secs. 88, 90, 91; *Shepherdson v. Whipple*, 107 Mass. 279; *Jewett v. Preston*, 27 Maine, 400; *Varney v. Hawes*, 68 Maine, 442; *Morrison v. Tillotson*, 84 Ill. 607; *Jarrett v. McDaniel*, 32 Ark. 598; *Spader v. Lawler*, 17 Ohio, 371; 4 Kent, Com. 176, side p. and note 3, p. 175; *Fry v. Bank*, 111 Ill. 367; *Bank v. Finch*, 3 Barb. Ch. 293. (2) A party will not be permitted on the trial to give evidence contradicting his pleadings. *Bruce v. Sims*, 34 Mo. 246; *Weil v. Posten*, 77 Mo. 287; *Wilson v. Albert*, 89 Mo. 538; *Kuhn v. Weil*, 6 Mo. App. 576; *Kuhn v. Weil*, 73 Mo. 213; *Carrier v. Love*, 32 Mo. 203; *Barthlow v. Campbell*, 56 Mo. 117; *Wright v. Town of Butler*, 64 Mo. 165; *Ramsey v. Henderson*, 91 Mo. 560. (3) A chattel mortgage to be of any validity as against creditors of the mortgagor must point out the subject-matter of it, *i. e.*, the property "so that a third person by its aid together with the aid of such inquiries as the instrument itself suggests may identify the property covered." *Stonebraker v. Ford*, 81 Mo. 562, *loc. cit.* 538; *Bank v. Metcalf, Moore & Co.*, 29 Mo. App. *loc. cit.* 394; Jones on Chattel Mortgages, sec. 55; 24 Cent. Law Jour. 339. But the court in the trial of this case erroneously permitted oral testimony to identity the mules such as that they were the only mules of the kind Bailey owned at the time, and that a light brown and a brown was the same as a bay and a mouse-colored. *Tindall v. Wasson*, 74 Ind. 495; Jones Chattel Mortgage [3 Ed. 1888] sec. 64; *Campbell v. Allen*, 38 Mo. App. 27; *Tindall v. Wasson*, 74 Ind. 495; *Cattle Co. v. Bilby*, 37 Mo. App. 43; *Jennings v. Sparkman*, 39 Mo. App. 663. (4) There was no evidence of any fraud between plaintiff and Bailey in the inception of his mortgage or with subsequent treatment by the parties, and the court erred in submitting that question to the jury. *White v. Chaney*, 20 Mo. App. 386; *Breen*

v. Hinkle, 13 Pac. Rep. 289; 2 Starke, Dig., p. 286. A chattel mortgage which leaves the mortgagor in possession with tacit understanding that he may sell the property for his own use is void against creditors, and the court erred in refusing the sixth instruction for plaintiff submitting that issue to the jury. *McCarty v. Miller & Co.*, 41 Mo. App. 200; *Hanger v. Hughmeister*, 21 N. E. Rep. 1046, and cases in foot note; 6 Cent. Law Jour., p. 289. *A fortiori* when the evidence as in this case tended to show that Brown permitted Bailey to appropriate all the property in his mortgage to his, Bailey's, use. *Strohn v. Hays*, 70 Ill. 41; *Diver v. McLaughlin*, 2 Wend. 596; *Wescott v. Gunn*, 4 Duer. (N. Y.) 103; *Rowley v. Rice*, 11 Metcalf (Mass.) 333; *Cornell v. Pierson*, 8 N. J. 478 (4 Halstead); *Stein v. Herman*, 23 Wis. 132; *Snell v. Harrison*, 83 Mo. 651; *McMichols v. Richter*, 13 Mo. App. 515. (5) The court erred in admitting in evidence the testimony of Brown and Wirt as to the declarations of Bailey made in the absence of Sparks, and long after the conveyance to Sparks. No foundation had been laid, and its admission is in direct conflict with the doctrine laid down in *Boyd v. Jones*, 60 Mo. 454; *McLaughlin v. McLaughlin*, 16 Mo. 242; *Heinrich v. Porter*, 47 Mo. 293.

J. P. Orr and *O. L. Houts*, for respondent.

(1) Though respondent's chattel mortgage recites that it was given to secure an absolute note of $400, yet it was competent to prove by parol evidence that the note and mortgage were in fact given to secure a contingent liability of the mortgagee, as the mortgagor's surety for an amount not greater than the note, and in the absence of fraud such a mortgage is good against a subsequent mortgagee. *Sparks v. Brown*, 23 Mo. App. 505; Jones on Chattel Mort., secs. 90, 82, 88; *Foster v. Reynolds*, 38 Mo. 553; *Stonebraker v. Ford*, 81 Mo.

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535; *Munson v. Ensor*, 94 Mo. 505. (2) The mortgage sufficiently described the property. It was shown that by the aid of the description in the mortgage that the property could be identified, and that the mules described in the mortgage, and in this action, were the only ones owned by the mortgagor at the date of this mortgage. *Sparks v. Brown, supra; Stonebraker v. Ford, supra; Jennings v. Sparkman*, 39 Mo. App. 663; *Campbell v. Allen*, 38 Mo. App. 27, and cases cited; *Boeger v. Langenberg*, 42 Mo. App. 7. The decision of this court when this case was here before is the law of this case, and settled both of the foregoing propositions in favor of respondent for the purposes of this appeal. (3) The court did not err in giving respondent's fourth instruction. *Andrews v. Costican*, 30 Mo. App. 29. (4) Appellant's sixth instruction was properly refused. *Hayner & Co. v. Churchill*, 29 Mo. App. 676, and cases cited; *McAllister v. Barnes*, 35 Mo. App. 668, and cases cited. There was no error in admitting the declarations of Bailey to Brown and Wirt concerning the delivery by Bailey of the possession of the property in question to Wirt and Brown.

SMITH, P. J.—The statement of this case reported in 33 Mo. App. 505, together with such references as we shall hereinafter make to the evidence and the instructions, when we come to consider the questions arising thereon, it is believed, will be found sufficient for the purposes of this case. The judgment on the former appeal having been reversed and the cause remanded, a second trial has been had resulting in a judgment for the defendant, from which the plaintiff now appeals.

I. The mortgage under which defendant Brown makes claim to the property in dispute recites that it was given to secure a note made by Bailey to him for $400, and the question which we are required to decide is whether the circuit court erred in permitting defendant

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to introduce parol evidence to show that the note and mortgage were in fact given to secure a contingent liability of defendant as the security of Bailey to an amount not greater than that ot the note. This question, when the case was here on a former appeal, was ruled in the affirmative. The defendant now contends that this question is not open to re-examination by us and invokes the application of the principles of the maxim, *Stare decisis, et non quieta movere.* The supreme court of the United States in *Roberts v. Cooper*, 20 Howard, 467, held that none of the questions which were before the court on the first writ of error could be reheard or re-examined upon a second writ of error or appeal in the same cause. But the supreme court of this state has not adhered to that rule in all its strictness, but has adopted it with a qualification that it would reconsider its former adjudication where no injustice or hardships would result from reviewing, and, if wrong, overrule its former opinions. *Boone v. Shackelford*, 66 Mo. 493; *Chambers v. Smith*, 30 Mo. 156; *Keith v. Keith*, 97 Mo. 223. We are unable to perceive that a reconsideration of the adjudication of any question in this case can result in any injustice or hardship to the defendants, within the meaning of the exception to the rule just quoted.

The rule is firmly embedded in our equity jurisprudence that, in cases where an instrument does not truly express the agreement of the parties, that the mistake may be shown by parol evidence as well when the defendant is resisting the enforcement of the instrument, as in a direct proceeding to reform it. *Johnson v. Houston*, 17 Mo. 58; *Leitsendorfer v. Delphy*, 15 Mo. 167; *Miller v. Dunlap*, 22 Mo. App. 97; *Jones v. Shepley*, 90 Mo. 307; *Corrigan v. Tiernay*, 100 Mo. 276; *Hogel v. Lindell*, 10 Mo. 493; *Montaney v. Rock*, 10 Mo. 56; *Kuntz v. Temple*, 43 Mo. 71; *Koehring v. Muemminghoff*, 61 Mo. 403; *State ex rel. Nieman v. Koch*, 40 Mo. App. 635. This case under the pleadings is an

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action at law having none of the characteristics or features of a proceeding in equity. The cases cited in the former opinion, with a single exception, were all of an equitable nature, and, therefore, do not lend the least support to it. The excepted case is that of *McKinster v. Babcock*, 26 Barb. 378, which seems to very fully support the rule announced in the opinion. It is there said, "it has been adjudged in several cases that parol evidence is admissible to show the purpose and intent for which a mortgage was executed, though, upon its face, it should appear to be for the payment of a specified sum of money. It may be shown that its purpose was security for further advances or responsibilities as for balances which might be due from time to time." In *Henderson v. Henderson*, 13 Mo. 151, it is, in effect, declared to be the rule of the American cases that parol evidence is admissible to show the real consideration, both as to amount and character, of a deed. But when the operation of the deed in respect to the interest or estate purporting to be conveyed or sought to be affected, such testimony is inadmissible. The rule is otherwise in Wisconsin. *Fallet v. Heath*, 15 Wis. 601. But the rule in this state is, we think, as stated in the former opinion, and to which we must adhere.

II. It is further contended that the trial court erred in admitting in evidence, over the objections of the plaintiff, the testimony of defendant Brown and Wirt as to the acts and admissions of Bailey made in the absence of plaintiff after the execution of both mortgages, and after defendant had taken possession of the property. It is a familiar principle of the law that an assignor or grantor can do no act, nor make any admissions subsequent to the assignment or grant, to impeach or impair the title of his assignee or grantee any more than the acts or admissions of a stranger. *Zoll v. Carnahan*, 83 Mo. 35; *Stewart v. Thomas*, 35 Mo. 202; *Gutzweiler's Adm'r v. Lackmann*, 39 Mo. 91; *Weinrich v. Porter*, 47 Mo. 293.

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The acts and declarations of Bailey under the circumstances were wholly inadmissible in evidence under any issue in the case, and should have been excluded.

III. The plaintiff's further insistance is, that the court erred in permitting the introduction in evidence by defendant of the mortgage deed under which he claimed title to the property. The plaintiff in his petition claimed that he was entitled to the possession of "one mouse-colored mare mule, fourteen hands high, about seven years old, and one bay mare mule, fourteen hands high, about eight years old." The answer in terms admits that the defendants were in possession of the property mentioned in the plaintiff's petition, etc. The mortgage offered in evidence described "one brown mare mule, five years old, and one light brown mare mule, five years old." The plaintiff's objections to the admission in evidence of the defendant's mortgage were, *first*, that it shows on its face that it is not for the same property described in plaintiff's petition; *second*, that it contradicts the issues made by the answer, and, *third*, that the colors of the mules described in the petition and answer and the defendant's mortgage were not the same.

Manifestly the mortgage description of the mules is different from that in the petition. The descriptive terms employed are not the same, nor can we say that these terms have a like signification and meaning, or that they may be employed interchangeably. The term "bay" is defined as applied to horses, to be red or reddish, inclining to chestnut. No definition is given in the works of lexicographers, to which we have had access, of the compound term, "mouse-colored." Zoology informs us that a mouse is a small, rodent quadruped, and it may be inferred that, "a mouse-colored" mule would wear the color of that rodent, whatever it may be termed. We should be inclined to hold that the two descriptions by their terms do not cover the same property, and that the admission of defendant's mortgage was

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error. But, if it was error, we think the error was cured by the subsequent introduction of parol evidence tending to show, among farmers and stockmen, that these descriptive terms are used interchangeably and synonymously. And we think this could be properly shown by evidence *aliunde.* Jones on Chat. Mort., secs. 53, 54, 55; *Winter v. Lannfere*, 42 Iowa, 471; *Tindall v. Wasson*, 74 Ind. 495; Herman on Chat. Mort., sec. 39; *Long Bros. v. Armsby Co.*, 43 Mo. App. 253.

IV. The plaintiff complains of the action of the court in refusing this instruction asked by him, viz.: "6. The court instructs the jury that if you should find and believe from all the evidence in the case that at the time of the contracting of the indebtedness described in plaintiff's chattel mortgage (if it was contracted) between Bailey, Sparks and Brinker, that defendant's mortgage embraced all the property then owned by Bailey, and that afterwards and before the institution of this suit the said defendant Brown permitted Bailey to remain in possession of the property and apply the proceeds to his (Bailey's) own use, then said mortgage, although but for such conduct was valid, was by such conduct of Brown rendered fraudulent as to plaintiff, and you should so find." We think this complaint well founded, and that the court should have given the plaintiff the benefit of the rule it asserts. The defendant's mortgage covered, besides the mules in controversy, five head of horses, two-thirds of forty-five acres of corn in the field, two-thirds of sixty acres of wheat in the stack, wagon, reaper, cultivators, with other property of the value of upwards of $1,000. There was evidence adduced tending to show that Bailey, the mortgagor, with the consent of the defendant was permitted to sell and dispose of any of the mortgaged property that he chose and to appropriate the proceeds to his own purposes. This we think rendered the mortgage void as to the plaintiff, an existing creditor, claiming the mules as a security for his debt under a junior mortgage. *McCarty v. Miller*

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& Co., 41 Mo. App. 200; *Haugen v. Hachemeister*, 21 N. E. Rep. 1046; *Hisey v. Goodwin*, 90 Mo. 366; *Weber v. Armstrong*, 70 Mo. 217; *Greely v. Reading*, 74 Mo. 309. If these facts should be found from the evidence to exist, they would render the mortgage void as a matter of fact. This question of fact the plaintiff was entitled to have submitted to the jury under the instructions he asked.

V. The defendant's fourth instruction which told the jury, viz.: "The court instructs the jury that, although they may believe from the evidence in the case that the note of plaintiff from Bailey read in evidence is unpaid, yet if they further believe from the evidence that plaintiff instituted this suit and took possession of the property in question, with the intent and for the purpose of hindering or delaying or defrauding defendant in the collection of his debt against Bailey, if they find and believe said Bailey was indebted to defendant, and for the purpose of delivering, and that he did deliver said property to said Bailey for his use and benefit, then plaintiff cannot recover, and the jury will find the issues for the defendant," was improperly given. There was no evidence upon which to base it. If the plaintiff, in good faith, pursued his legal remedy to obtain possession of the property, and to subject it to sale under his mortgage, certainly no inference could arise from this fact alone that it was his intention to thereby aid Bailey in defrauding Brown in the collection of his claim; even if it was Bailey's intent, when he notified plaintiff that defendant had taken possession of the property, to induce him to bring the suit, and, when the property was taken into his possession under the writ, to in that way reacquire the possession himself, there is no evidence, direct or inferential, that plaintiff had knowledge of such intent or participated in it. Plaintiff could not be guilty of fraud, unless he participated in the fraudulent intent of Bailey. *State v. Hope*, 102 Mo. 410.

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There should have been, as there was not, some proof of this before the court was authorized to submit such an issue to the jury.

It results from these considerations that the judgment of the circuit court must be reversed and the cause remanded. All concur.

46	539
49	390
49	404
51	147
46	539
58	256
46	539
78	681
46	539
84	460

S. P. GRIFFITH, Defendant in Error, v. KANSAS CITY MATERIAL AND CONSTRUCTION COMPANY, Plaintiff in Error.

Kansas City Court of Appeals, November 9, 1891.

1. **Sales:** FAILURE TO DELIVER: MEASURE OF DAMAGES. Upon the seller's failure to deliver the goods according to contract, the ordinary measure of damages is the difference between the contract price and the market price of the goods at the time when, and the place where, they should have been delivered.

2. **Trial Practice:** SPECIAL FINDING: WHAT IS NOT: DUTY OF COURT. At the conclusion of the evidence, the judge stated his opinion of the facts, and what the evidence conduced to show, and what the judgment should be. *Held*, not to be a special finding. It is no more the duty of the court now, than under the code of 1855, to make a special finding of facts in a cause tried by it, unless one of the parties thereto request it with the view of excepting to the decision of the court upon the question of law or equity arising in the case, in which case the court is required to state in writing the conclusions of facts found separately from the conclusions of law.

3. **Appellate Practice:** REVIEW OF LAW AND FACTS. An appellate court has only power to review the law declared by the court below, and, when that court is intrusted with both law and facts, it must assume the facts to be as the court found them, as it is not in its province to review the general finding of courts in law cases.

Appeal from the Jackson Circuit Court.—HON. R. H. FIELD, Judge.

AFFIRMED.

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Junius W. Jenkins and *W. C. Wells*, for plaintiff in error.

(1) The measure of damages as contained in instruction, we contend, is the true one, and is sustained by abundant authority. "The general rule is well established, that on the seller's failure to deliver the goods, according to the contract, the ordinary measure of damages is the difference between the contract price and the market price of the goods at the time when, and the place where, they should have been delivered." Or the buyer may purchase elsewhere at the lowest price attainable, and charge seller with difference. 2 Benjamin on Sales [Ed. 1884] secs. 1327, 1333, 1335, 1305, and note 2; *Mfg. Co. v. Mfg. Co.*, 100 Mo. 325; *Wire Co. v. Hardware Co.*, 93 Mo. 289; *Rickey v. Tenbroek*, 63 Mo. 563; *Koeltz v. Bleckman*, 46 Mo. 320; *Northrup v. Cook*, 39 Mo. 208. (2) The court made a special finding as to proof of damages which the defendant sustained, as follows: "But, there being no evidence of the market value of such stone on November 1, 1888, the date for its delivery, the court can only allow defendant nominal damages herein for the breach of the contract by the plaintiff's assignor." We claim that this is error as matter of fact. Section 2135, Revised Statutes of Missouri, provides that the conclusion of fact as made by the court can be assigned as error, and the same can be reviewed by the court. The court decided that there was no evidence of the market value November 1, 1887, and in this we think the court erred. (3) Our contention is that, while it may be true that the valuation is to be fixed as of November 1, yet the evidence is not to be confined to that day in order to arrive at that value. This is a question of first impression with this court, and has not been decided by our supreme court, so far as we know, and, therefore, we ask especial attention to the following cases. "Evidence of price for a brief period before and after may be

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given to show the price on that day." *Cahen v. Platt*, 69 N. Y. 348-352; *Harrison v. Glover*, 72 N. Y. 451; *Douglass v. Merselis*, 25 N. J. Eq. 147; *Kountz v. Kirkpatrick*, 72 Penn. 376; *Kipp v. Wiles*, 3 Sanf. (S. C. R.) 585; 3 Parsons on Contracts [6 Ed.] 207; *Smith v. Griffith*, 3 Hill, 337-8.

N. F. Heitman, for defendant in error.

(1) Instruction, numbered 1, was an attempt to state the rule as to the measure of damages, but it failed to state the rule correctly, and the court properly refused to give it. The record shows that the court was governed by the correct rule as to the measure of damages, which is the difference between the contract price and the market value at the time and place of delivery. 5 Am. & Eng. Ency. of Law, p. 30; *Koeltz v. Bleckman*, 46 Mo. 320; *Northrup v. Cook*, 39 Mo. *208; *Wire Co. v. Hardware Co.*, 97 Mo. 289, does not apply. The case of *Mfg. Co. v. Mfg. Co.*, 100 Mo. 325, is founded on an entirely different state of facts from this case, and does not apply. The case of *Rickey v. Tenbroek*, 63 Mo. 563, is a case of action by seller against buyer for non-acceptance. (2) As to error of fact, or that the judgment is contrary to the evidence, plaintiff in error fixed the time and place when and where the stone was to have been delivered, and the court found from the evidence that it failed to prove the value of the stone, not delivered, at the time and place it should have been delivered according to its own version of the contract. Where there is any evidence to support a verdict and judgment, this court will not disturb it simply because it is against the weight of evidence. *Rea v. Ferguson*, 72 Mo. 226; *Price v. Evans*, 49 Mo. 396; *Spohn v. Railroad*, 87 Mo. 84; *Jackson v. Railroad*, 29 Mo. App. 494; *Wire Co. v. Hardware Co.*, 97 Mo. 289. (3) A judgment will not

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be reversed unless it appear that error has been committed by the lower court materially affecting the merits of the action. *Hunter v. Miller*, 36 Mo. 143; *Orth v. Doerschlein*, 32 Mo. 366; *Garneau v. Herthel*, 15 Mo. 191; *Doering v. Saum*, 56 Mo. 479; *Armstrong v. Railroad*, 45 Mo. 236. (4) By reference to the record entry of judgment in this case it will be seen that there was no separate finding of facts under section 2135, nor was any such finding requested by either party. The remarks of the judge contained in the bill of exceptions will not be treated as a special verdict, or as a finding of fact, and are no part of this record. Statements in the opinion of the trial judge are not to be regarded as forming part of the bill of exceptions, and this court cannot take notice of them as showing what was done at the trial. *Bricheisen v. Coffey*, 15 Mo. App. 80, 85; *Field v. Crecelius*, 20 Mo. App. 302. (5) Before evidence of value for a brief period before and after the day fixed for delivery is admissible to show the value on the day of delivery, a foundation for such secondary evidence must first be laid by proving that there was no market for the property on the day of delivery. Defendant failed to lay the foundation for evidence on other days than the first of November, 1887, and at other places than Kansas City. The authorities cited by defendants, carefully considered, will bear me out in this proposition. 2 Benjamin on Sales [Ed. 1884] 978, note under "market price or value." *Shephard v. Hampton*, 3 Wheat. 200; *Grand Tower v. Phillips*, 23 Wallace, 471, 479; *Fessler v. Gove*, 48 Pa. 407; *Parsons v. Sutton*, 66 N. Y. 92.

Smith, P. J.—This was a suit commenced before a justice of the peace to recover $156.75 on an open account for four hundred and ninety-four lineal feet of curbing stone at forty-three cents per foot. The defendant filed an offset in which, among other items, it was claimed that plaintiff had contracted to deliver

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two thousand feet of curbing stone, and had failed to deliver fifteen hundred and seven feet, and that defendant had to go into the market and buy curbing stone on account of the default, and to pay nine cents a foot more for it than plaintiff had contracted to deliver it, thereby damaging defendant to the sum of $135.63. The plaintiff had judgment in the circuit court, and defendant brings the case here by writ of error.

I. The principal ground of the defendant's complaint is, that the circuit court erred in refusing to give the following instruction asked by it: "The court declares the law to be, that if the evidence shows that the two cars of stone for the value of which this suit was brought were sold and delivered to the defendant by H. L. Hart under a contract between said Hart and defendant, made in August, 1887, by the terms of which said Hart sold to defendant two thousand feet of curbing stone at forty-three cents per foot, to be delivered to defendant, free of freight and other charges, on the sidetrack at defendant's yard in Kansas City, Missouri, by the first day of November of that year; and that the defendant, upon the faith of said contract with Hart, made contracts with other parties in Kansas City, Missouri, to set said stone for them, and if the evidence further shows that said Hart, without any fault of defendant, failed to deliver to defendant any other stone under said contract except said two cars containing about four hundred and ninety-four feet, and that defendant, by reason of such failure on the part of Hart, was compelled to buy stone of other parties, and pay fifty-two cents per feet therefor, to enable it to carry out its contract with other parties, then the defendant is entitled to an allowance as a counterclaim against the claim of the plaintiff, the difference in price between forty-three cents and fifty-two cents per foot, to the extent of the balance of the two thousand feet which

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said Hart sold and agreed to, but failed to, deliver to defendant."

The defendant's insistance is that this instruction stated the correct rule for the a measurement of the damages in this case. The general rule is well established, that, on the seller's failure to deliver the goods according to the contract, the ordinary measure of damages is the difference between the contract price and the market price of the goods at the time when and the place where they should have been delivered. *Stewart v. Ball*, 33 Mo. 153; *Koeltz v. Bleckman*, 46 Mo. 320; *Northrup v. Cook*, 39 Mo. 208; *Whitman v. Coots*, 14 Mo. 9; *Rickey v. Tenbroek*, 63 Mo. 563; *Harrison Wire Co. v. Hardware Co.*, 97 Mo. 289. The refused instruction is not in harmony with the rule just stated. The measure of the defendant's damages for the plaintiff's fault was the *difference between* the contract price and the market price of the stone at the contractual time and place of delivery. *Stewart v. Ball, supra;* Benj. on Sales, secs. 869, 903, p. 859, note; Sedgwick on Dam. 282. *The time when and place where* the stone was to be delivered are elements of fact not embraced in the hypothesis of the instruction, and for that reason it should have been, as it was, refused.

II. At the conclusion of the evidence in the case the learned judge who tried the case remarked *ore tenus:* "I can state my opinion of the facts in this case, and probably save arguing the declarations of the law," etc. He then proceeded further to state what in his opinion the evidence conduced to show, and what the judgment should be. The defendant's counsel then stated to the court that he had some declarations of law that he would like to have passed upon. This request was granted. The defendant contends that this was a special finding under section 2135, Revised Statutes. It is no more the duty of the court now, than it was under the code of 1855, to make a special finding of facts in a

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cause tried by it (*Karlbaum v. Roepke*, 27 Mo. 161; *Judge v. Booge*, 47 Mo. 544; *Ervin v. Brady*, 48 Mo. 560; *Jordan v. Buschmeyer*, 97 Mo. 94; *Reese v. Cook*, 17 Mo. App. 512), unless one of the parties thereto request it with the view of excepting to the decision of the court upon the question of law or equity arising in the case, in which case the court is required to state in *writing* the conclusions of facts found separately from the conclusions of law. The statute just referred to was no doubt intended as a qualification to the rule of practice as it existed under the code of 1855.

The application and hardship of that rule is illustrated in the cases last cited. Under the statute, as it now exists, when a court trying a case has upon any question of fact made a general finding thereon, the party feeling himself aggrieved thereby has the right to request the court to state in writing the conclusion of facts found. Then upon appeal or writ of error it shall be the duty of the revising court to review such conclusions of facts. It is, therefore, apparent that the so-called conclusions of facts of the judge in this case were not made in conformity to the statutory requirements, nor was such the understanding of either judge or counsel at the time. The deliverance of the judge was an opinion on the rights of the parties based on the evidence, but not an attempt to "state in *writing* the conclusion of facts found separate from the conclusions of law," as contemplated by the statute. Regarding what the judge is reported to have said as a mere opinion of his, and not as a special verdict or finding of facts or part of the record, we cannot notice it.

After a careful examination of the record, we cannot say there is no evidence to support the finding of the court. This court has only the power to review the law declared by the court below, and when that court, as was the case here, was intrusted with both law and facts, we must assume the facts to be as the court found

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them. It is not our province to review the general findings of courts in law cases. *Norris v. Mabury*, 39 Mo. App. 295; *Hamilton v. Boggess*, 63 Mo. 233; *Ayers v. Fitzgerald*, 94 Mo. 207; *Gaines v. Fender*, 82 Mo. 497.

It seems to us that the judgment is for the right party, and should be affirmed, which is ordered accordingly. All concur.

46	546
72	640

46	546
77	342

46	546
96	[4] 58
98	[4] 328

WILLIAM WATSON, Appellant, v. MRS. O. C. K. RACE, Respondent.

Kansas City Court of Appeals, November 9, 1891.

1. **Evidence**: PRINCIPAL AND AGENT: DECLARATIONS OF AGENT. A party cannot be bound by any statement or admission of a person not his agent in the matter referred to at the time; and while the fact that one had been acting as agent of defendant is competent to show a general agency, it is incompetent if it is sought thereby to show agency in another matter with a view to infer such agency in the matter in controversy.

2. **Deposition**: WHO MAY READ: WHOSE PROPERTY. A deposition taken and filed in the cause is the common property of the litigants therein, and either is entitled to use it, and a party putting interrogations on cross-examination in the deposition of a witness may decline to read the same with the answers thereto, but, if he do, then the other party may read them.

3. **Appellate Practice**: OBJECT NOT URGED BELOW. Objections not urged below against the admission of evidence will not be considered on appeal.

4. **Practice, Trial and Appellate**: ASKING INSTRUCTIONS: BILL OF EXCEPTIONS. Instructions should be asked before the cause is submitted to the jury, or the court sitting as a jury, and, if asked afterwards, they are out of time, and the court can rightfully refuse to consider them; and where the bill of exceptions, which to the appellate court imports absolute verity, shows instructions were first presented after the announcement of the court's finding, the appellate court will not review the action of the trial court in declining to pass upon them.

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5. **Appellate Practice: EXCEPTION: MOTION FOR NEW TRIAL.** **The appellate court is precluded from reviewing an action of the trial court to which no exception was saved, and to which the attention of the court was not called in the motion for a new trial.**

6. **———: DISTURBING FINDING. Where there is ample testimony in the record to sustain the finding, the judgment will not be disturbed.**

Appeal from the Jackson Circuit Court.—HON. J. H. SLOVER, Judge.

AFFIRMED.

W. C. Wells and *Junius W. Jenkins*, for appellant.

(1) Our first point is that the court erred in refusing to allow the plaintiff to answer the question: "State what occurred the first time that Dr. Ewing came to you and spoke to you about your services as an architect." Watson distinctly states that he came to him from Mrs. Race as her agent; that he had been superintending the residence Mrs. Race was then building, and that he, during the whole of that time, acted as her agent. 2 Greenl. Ev. [Redfield's Ed.] sec. 65. (2) Plaintiff sought to establish Broadwell's authority to act for Mrs. Race, by asking plaintiff this question, "Do you know whether or not Col. Broadwell had been acting as the agent of Mrs. Race before you were sent to him?" Story on Agency [Redfield's Ed.] sec. 65. (3) Broadwell's deposition was taken by the defendant, and the whole of his direct examination (except his name, age and place of residence) was objected to at the hearing, and the objection sustained; defendant's counsel then proposed to read the testimony elicited on cross-examination, and plaintiff's counsel objected because that testimony was plaintiff's, and he did not want to offer it. This presents a question of first impression in this state as far as we have been able to find. The

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question then resolves itself into this, could the defendant use as evidence testimony elicited on cross-examination, of which she could not have availed herself had she brought it out on direct examination. We especially submit that she could not do it. *Reed v. Hogson*, 1 Cranch Ct. Reports, p. 491; *Polly v. Ins. Co.*, 14 Me. 153; *Gordon v. Little*, 8 Serg. & R. 555; *Smith v. Biggs*, 5 Simons, 392. If the direct examination is inadmissible then the cross-examination cannot be admitted for the direct examiner. Thompson on Trials, sec. 423; *Calleson v. Smith*, 20 Kan. 37; *Glasgow v. Allen*, 11 Mo. 34; *Welsh v. Agnew*, 12 Mo. 520; *Delventhal. v. Jones*, 53 Mo. 460; R. S. 1889, sec. 4463; *State v. Dunn*, 60 Mo. 64; *Holman v. Bachus*, 73 Mo. 49; 2 Phillips on Evidence [4 Ed.] 209, 212; *State v. Bryant*, 55 Mo. 75. (4) The court erred in refusing to consider and pass on the declarations of law presented to it by plaintiff. The reason assigned by the judge for refusing to pass on the declarations of law presented was failure of counsel to comply with the rule of court. The only use declaration of the law could possibly be in a cause tried by the court sitting as a jury is to inform the appellate court of the views of the trial court. Now this could be done just as well immediately after the decision as before. *Kimberlin v. Short*, 24 Mo. App. 646; *Gaty v. Clark*, 28 Mo. App. 352; *Cooper v. Ord*, 60 Mo. 431; *Stone v. Spencer*, 77 Mo. 361; *Bolt & Iron Co. v. Buell*, 8 Mo. App. 594; R. S., sec. 2188. This case was never argued and submitted as the bill of exceptions clearly shows. The request to pass on the declarations of law was under the statute, therefore, made in time, and no mere rule of court can deprive a party of the right. *Purcell v. Railroad*, 50 Mo. 504; *Calhoun v. Crawford*, 50 Mo. 458; *Huff v. Shepherd*, 58 Mo. 242; *State v. Underwood*, 75 Mo. 230; *Whitset v. Blumenchatt*, 63 Mo. 479; *State v. Lewis*, 9 Mo. App. 321; 74 Mo. 222; *Erdmitter v. Kump*, 61 Mo. 340; *Hannel v. Freund*, 17 Mo. App. 618; Thompson on Trials,

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sec. 2359. (5) Our next contention is, that the court erred in refusing to allow plaintiff's counsel to argue the case on the law and evidence, and it erred also in not permitting him to argue the motion for new trial. Cooley, Const. Lim., p. 321. The right to be heard by counsel exists, and it cannot be taken away. *State v. Page*, 21 Mo. 258; *Dobbins v. Oswalt*, 20 Ark. Barb.'s Rep., p. 624; *Brooks v. Perry*, 23 Ark. 32; *Douglass v. Hill*, 29 Kansas, 528. To refuse it is denial of a right. *Sandusky v. McGee*, 4 Marshall, J. J. 271; *Ward v. Commonwealth*, 3 Leigh. 743; *Commonwealth v. Porter*, 10 Metcalf, 263; *Millard v. Thorn*, 56 N.Y. (11 Sickles) 405; *Garrison v. Wilcoxson*, 11 Ga. 158; *Lee v. Lee*, 9 Barr (Penn. St. Rep.) p. 169; *Benson v. Mahoney*, 6 Baxter (Tenn.) p. 307. See also dissenting opinion of Judge Scott in *State v. Page*, 21 Mo. 261. (6) The court found contrary to the law and evidence. When the verdict is manifestly against the law and evidence the judgment will be reversed. *Ackley v. Staehlin*, 56 Mo. 558, 579; *Hearne v. Keith*, 63 Mo. 84; *Public Schools v. Woods*, 6 Mo. App. 590; 77 Mo. 197.

Beebe, Randolph & Watson, for respondent.

(1) The court did not err in refusing to allow plaintiff to state what occurred between himself and Dr. Ewing as no agency was established. That Ewing had been plaintiff's agent in another and entirely different transaction, had no tendency to prove that he was her agent in the particular transaction forming the basis of this action. *Bacon v. Johnson*, 36 Mich. 182; *Hatch v. Squires*, 11 Mich. 185; *McClung v. Spotswood*, 19 Ala. 165; *Railroad v. Henlein*, 52 Ala. 606; *Frances v. Edwards*, 77 N. C. 371; *Peck v. Ritchey*, 66 Mo. 114. (2) Nor did the court err in refusing to allow Watson to state (for the purpose of establishing Broadwell's agency to act in the matter of employing him to make plans) that "he knew it by Broadwell's employing other persons there." The fact that Broadwell

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"employed other persons there" would not tend to establish his authority to employ those persons, much less to employ him. (3) The court did not err in admitting Broadwell's deposition. There can be no question as to admissibility of this testimony. *McClintock v. Curd*, 32 Mo. 411; *Byers v. Oberstein*, 44 N. W. Rep. 129; *Turnbull v. Richardson*, 37 N. W. Rep. 499. If the evidence was relevant and competent, it mattered not which side offered it. *Turnbull v. Richardson*, 37 N. W. Rep. 499. (4) The court did not err in declining to hear counsel make an oral argument. He was asked to state his position and did so. A court is not bound to hear counsel orate. Besides, no exception was taken to the action of the court, nor was the alleged irregularity noticed in the motion for a new trial. (5) The decision of the court was obviously the only one that could have been given upon any intelligent consideration of the evidence.

Gill, J.—Plaintiff Watson sued the defendant Race for and on account of certain services as architect, consisting of some preliminary sketches and drawings for a block of flats about to be erected by the defendant, Mrs. Race. The issues were tried before the court, without the aid of a jury, when finding and judgment was for defendant, and plaintiff appeals. The matters of complaint are thus pithily expressed by plaintiff's counsel. It is urged that "the court erred in refusing testimony offered by plaintiff; that it erred in admitting the cross-interrogations and answers thereto of Broadwell; that it erred in refusing to pass on declarations of law offered by plaintiff; that it erred in refusing to allow counsel for plaintiff to argue the case both on its merits and on motion for new trial, and that the court decided the case against the law and the evidence." We proceed to notice these objections in the order named.

I. As to the rejected evidence, the court first refused to permit plaintiff to testify as to a certain

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conversation he had with Dr. Ewing. In this the court was correct. Ewing could not bind Mrs. Race by any statement or admission, as it was not shown that he was agent for her in the matter referred to. That Dr. Ewing was the relative of the defendant, or that he had in some way prior thereto acted as her agent in the construction of another building, did not establish an agency in the matter of the building then about to be erected. Further along plaintiff, while on the witness stand, was asked, "Do you know whether or not Col. Broadwell had been acting as the agent of Mrs. Race before you were sent to him." This was objected to, objection sustained, and of which complaint is now made. If the object of this question was to elicit facts tending to show a general agency existing between the defendant and Broadwell, then an answer should have been permitted. If, however, it was sought thereby to show that Broadwell had acted as agent for Mrs. Race in another matter from which it was to be concluded he was her agent in the matter under investigation, then the evidence was, as already said, properly rejected. However this may be, we cannot discover that any harm resulted to plaintiff from the court's action in this regard, since it appears the trial judge was fully informed by other evidence in the case just what relation existed between Mrs. Race and said Broadwell.

II. The next objection relates to the deposition of M. M. Broadwell, taken by consent of parties on interrogatories by defendant and cross-interrogatories by plaintiff. This testimony was directed to the question of Broadwell's agency, whether he was authorized by Mrs. Race to employ plaintiff to draw the plans, etc. At the trial defendant's counsel attempted to read entire Broadwell's deposition. Plaintiff's counsel first objected to certain of defendant's interrogatories for the alleged reason that the questions were "leading and calling for a conclusion of the witness." The court sustained said objection. Defendant's counsel then

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proceeded to read the remainder of the deposition, including the questions and answers propounded and elicited by plaintiff. Counsel for plaintiff objected to this, denying the right of the defendant to use any of the plaintiff's cross-interrogatories and answers thereto for the sole reason assigned, that such was plaintiff's evidence, that he did not offer them, and that defendant had no legal right thereto. This objection, so made by plaintiff's counsel was overruled, the cross-interrogatories and answers thereto were read by defendant's counsel, and plaintiff saved an exception. This point must be decided against the plaintiff. It seems to be settled that the deposition taken by one party to a cause may be used by the other notwithstanding it is not read by him at whose instance it was taken. A deposition taken and filed in the cause is the common property of the litigants therein, and either is entitled to use it, if otherwise competent. *Green v. Chickering*, 10 Mo. 109; *McClintock v. Curd*, 32 Mo. 411. And it is held in a late Minnesota case that the party putting interrogatories or cross-interrogatories in the deposition of a witness may decline to read the same with anwers thereto. but, if he do, then the other party may read them. *Byers v. Oberstein*, 44 N. W. Rep. 129.

Plaintiff's counsel further attacks the admission of this testimony on other grounds than those urged in the lower court. Clearly he cannot be heard here for the first time on such objections. The only ground for excluding such testimony, as presented in the circuit court, was that plaintiff did not offer the evidence, and, therefore, defendant could not.

III. The next error assigned is that the trial judge refused to pass on declarations of law offered by the plaintiff. As to this complaint, as well as to some others we shall presently notice, plaintiff's counsel, in brief and argument, have gone beyond the facts as stated in the record. We are bound absolutely by the bill of exceptions; to that alone we must look for the

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occurrences at the trial. At the conclusion of the evidence the statement in the bill of exceptions proceeds as follows: "Whereupon plaintiff's counsel arose to address the court, and the court declined to hear him make an oral argument in the case, whereupon defendant's counsel offered to address the court, which offer was also declined. But the plaintiff's counsel was requested to state the points merely that he relied upon to recover, and he did so, whereupon the court briefly reviewed the evidence, and while doing so agreed to the statement of plaintiff's counsel as to certain propositions ot law; but said, further, that the law as stated did not apply to the facts of the case as shown by plaintiff's own testimony, and thereupon decided the case in favor of the defendant. Thereupon, immediately, plaintiff's counsel requested the court to pass upon certain declarations of law, which declarations were already prepared, which the court declined to do, for the reason then announced that they were not presented before the court had announced and indicated its decision in this case, as required by the rule, now numbered 13, but originally numbered 12, of the court, adopted by all the judges of this court, and enforced since the beginning of January term, 1890, of this court, which said rule was in words and figures as follows: "13. Attorneys must have their declarations of law to be asked of the court ready to be passed upon by the court as soon as the evidence closes upon all issues and matters in the cause that ought to have been reasonably anticipated, *and, in all cases tried by the court sitting as a jury, declarations of law must be submitted to the court before its decision is announced or indicated.*"

This record (which to us imports absolute verity) exhibits no denial of right to the plaintiff in the matter now complained of. Section 2188, Revised Statutes, 1889, in terms provides that "when the evidence is concluded, and before the cause is argued or submitted to the jury, or to the court sitting as a jury, either party

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may move the court to give instructions on any point of law arising in the cause, which shall be in writing and shall be given or refused." The rule of the Jackson county circuit court above quoted, and incorporated in the bill of exceptions, is a reannouncement of this statutory provision. This record shows that plaintiff did not offer his instructions "*before* the case was argued or submitted * * * to the court sitting as a jury," but afterwards. Such declarations of law, then, were not presented in time, and the trial court was authorized in its refusal to consider the same. *Morehouse v. Ware*, 78 Mo. 100, 103.

IV. Plaintiff's counsel has, in brief and oral argument, urged with much earnestness and ability that we reverse this cause on the alleged ground that the trial court denied him an oral argument. However eloquent and forcible the argument here, and however pertinent and strong the authorities which have been so diligently searched out and so ably presented, we are not called upon to give our views on this point for the reasons patent on the record; *first*, that no exceptions were saved at the time, and, *second*, that the trial court was not, in the motion for a new trial, called upon to correct its own errors in this regard. The bill of exceptions shows that the court permitted only "a statement of points" by plaintiff's counsel, denying an oral argument, but the record fails likewise to say that exception to the ruling of the court was saved. Nor in a motion for a new trial was anything whatever said about the court's action in this matter. It is plain, therefore, that we are precluded from a consideration of the question.

V. As to the other point, that the finding and judgment of the trial court were wrong on the facts, it is only necessary to say that there is ample in this record to justify the court's finding, and we must, therefore, decline to disturb its judgment. The said judgment is, therefore, affirmed. All concur.

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RUFUS D. BUCK, Respondent, v. PEOPLE'S STREET RAILWAY, ELECTRIC LIGHT & POWER COMPANY, Respondent.

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63	115
46	555
70	84
71	268
71	615
46	555
81	229
46	555
93	[3] 27
93	[4]273
46	555
96	[1]558
100	[3]440

Kansas City Court of Appeals, November 9, 1891.

1. **Pleading:** SERVICE OF CHILD: ALLEGATION OF SERVANT: INSTRUCTION. A petition of the father for the loss of services of an infant son, by reason of injuries received through defendant's negligence, is not fatally defective because it fails to allege specifically that said son is the servant of the plaintiff, when the relation of father and son, the infancy of the son, and the right of the father to the services of the son, are fully set out. Such petition defectively states the plaintiff's title to his right of action, but does not wholly fail to state a title at all; an instruction on the same point is approved.

2. **Parent and Child:** FATHER'S RIGHT TO SERVICE. The right of action to recover for the services of the child is presumed to be in the father, and continues in him till the child's emancipation is shown or the right is waived; and this right grows out of, and is correlative to, the father's obligation to support.

3. **Pleading:** PRACTICE: CAUSE OF ACTION: OBJECTION: AIDER BY VERDICT. Both under the common law and the statute, when anything is omitted in the declaration, though it be matter of substance, if it be such that, without proving it at the trial, the plaintiff could not have had a verdict, and there is a verdict for plaintiff, such omission is no cause for arresting or reversing the judgment; and the rule is established in this state that, if material matter is not expressly averred, but is necessarily implied, the defect is cured by verdict. If, in such case, defendant pleads to the merits, he waives objection to mere formal defects, and will not be heard at the trial, or on appeal, to object that the petition does not state a cause of action, which objection can only be interposed when the petition wholly fails to state a cause of action.

4. **Negligence:** CONTRIBUTORY NEGLIGENCE: DEMURRER TO EVIDENCE: INSTRUCTION. A six-year-old boy was permitted by the driver and conductor of a street car to ride on the front platform of the car, and to undertake to alight from said platform, and, while in the act of so alighting, by a sudden lurch forward he was thrown off and under the car and injured. *Held*, a sufficient statement of fact to go to the jury on the question of negligence, in an action by the father for the loss of service; and that the father's consent for the son to ride upon defendant's car is not such contributory negligence as to take the case from the jury, as such consent is not the direct and proximate cause of the injury. An instruction ignoring contributory negligence approved.

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5. ——— : CHILD : AUTHORITY OF DRIVER : FARE : PASSENGER : PRESUMPTION. *Held, arguendo* :—

(1) Negligence cannot ordinarily be imputed to a six-year-old child.

(2) It is within the scope of the employment of a driver who is also a conductor to receive passengers on the car; and to let them off.

(3) The omission of the driver to demand or collect fare could not affect the boy's *status* as a passenger, or his right to the exercise of the highest possible degree of care and vigilance in the conduct and management of the car; and defendant would be liable for the slightest negligence.

(4) If the plaintiff consented to his son accepting the invitation of the defendant's driver to ride upon the car, the former had the right to presume that the driver would assign his son to some safe place in the car, instead of needlessly exposing him to the risk and peril of riding on, and getting off, the front platform. Presumptions as to comparative safety of the public streets and street-cars for children are mentioned in the opinion.

6. ——— : DEFINITIONS : REASONABLE CARE. Reasonable care and prudence imply the converse of negligence ; and, if reasonable care and prudence would have prevented the injury, then defendant is guilty of negligence.

7. **Damages:** LOSS OF CHILD'S SERVICES. Where a child has been injured through the negligence of another, the father is entitled to recover, as damages, an amount which will fully compensate him for the loss of service and the care of the child, and expense resulting from the injury, for a period not extending beyond the maturity of the child, including surgical attention, care, nursing, medicine and the like.

8. **Witnesses:** COMPETENCY OF CHILD. The action of the trial court in permitting the six-year-old injured boy to testify is reviewed and affirmed.

Appeal from the Buchanan Circuit Court.—HON. A. M. WOODSON, Judge.

AFFIRMED.

James W. Boyd and *D. D. Burnes*, for appellant.

(1) It was error to refuse the instruction asked by appellant, declaring that respondent was not entitled to recover in this case. Said instruction ought to have been

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given for several reasons: *First.* The petition does not state facts sufficient to constitute any cause of action. *Second.* The evidence fails to make out a case against appellant. Plaintiff's evidence fails to show any negligence on the part of appellant, but does show such contributory negligence as will defeat the alleged cause of action. *Dunn v. Railroad*, 21 Mo. App. 188; *Matthews v. Railroad*, 26 Mo. App. 75; *Murray v. Railroad*, 101 Mo. 236; *Kellney v. Railroad*, 101 Mo. 67; *Schlereth v. Railroad*, 96 Mo. 509; *Keitel v. Railroad*, 28 Mo. App. 657; *Florida v. Car Co.*, 37 Mo. App. 598; *Schultze v. Railroad*, 32 Mo. App. 438; *Hudson v. Railroad*, 101 Mo. 13. (2) The court committed error in giving instruction, numbered 1, asked by respondent. Said instruction, entirely ignores the questions as to whether Orley Buck was plaintiff's servant at the time of the accident, and whether plaintiff by said accident lost said Orley's services, or was damaged, or sustained any loss, by said accident. 21 Mo. App. 188, *supra;* 26 Mo. App. 75; *Bank v. Metcalf*, 29 Mo. App. 384; *Hoffman v. Parry*, 23 Mo. App. 20; *Fitzgerald v. Haywood*, 50 Mo. 516; *Raysdon v. Trumbo*, 52 Mo. 35; *Thompson v. Betts*, 8 Mo. 710; *Chouquette v. Barada*, 28 Mo. 491; *Merrit v. Givan*, 34 Mo. 98; *Turner v. Loles*, 34 Mo. 461; *Moffatt v. Conklin*, 35 Mo. 453; *Sawyer v. Railroad*, 37 Mo. 240; *Ins. Co. v. Seminary*, 52 Mo. 480; *Gerren v. Railroad*, 60 Mo. 405; *Peck v. Ritchey*, 69 Mo. 114; *State v. Wheeler*, 79 Mo. 366; *Wilkerson v. Thompson*, 82 Mo. 317; *Conner v. Taylor*, 82 Mo. 347; *State v. Hecox*, 83 Mo. 531; *Maxwell v. Railroad*, 85 Mo. 95; *Bank v. Crandall*, 87 Mo. 208. (3) The court committed error in giving instruction, numbered 3, asked by respondent. Said instruction is erroneous; it is not based on the pleadings or evidence; it is an enlargement of the issues made by the pleadings. *Price v. Railroad*, 72 Mo. 414; *Bank v. Murdock*, 62 Mo. 70; *Campbell, Adm'r, v. Heelan*, 43 Mo. 591; *Moffatt v. Conklin*, 35 Mo. 453; *Bank v. Westlake*, 21 Mo. App. 565; *Bank v.*

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Metcalf, 29 Mo. App. 384; 21 Mo. App. 188, *supra;* 26 Mo. App. 75, *supra; Current v. Railroad*, 86 Mo. 67; *Abbott v. Railroad*, 83 Mo. 278; *Glass v. Gelvin*, 80 Mo. 297; *Benson v. Railroad*, 78 Mo. 504; *Wade v. Hardy*, 75 Mo. 394. (4) The court committed error in giving instruction, numbered 5, asked by respondent. (5) The instructions given by the court on its own motion are erroneous. (6) The court committed error in refusing to give the instructions asked by appellant. (7) The court committed error in permitting Orley Buck to testify. He was only six years old at the time of the accident, and had not sufficient memory, recollection or intelligence to testify in the case at the time of the trial thereof.

Ryan & McDonald, for respondent.

(1) The competency of the witness, Orley Buck, was a question peculiarly for the trial court, which has the witness before it, to determine, and, unless it clearly appears from the evidence that the trial court has abused the discretion with which it is invested in that respect, the appellate court will not interfere with the ruling of the lower court. *State v. Scanlan*, 58 Mo. 204; *State v. Jefferson*, 77 Mo. 136; *Cadmus v. Bridge & Tunnel Co.*, 15 Mo. App. 86; *Ridenhour v. Railroad*, 102 Mo. 171. (2) Considering the age of the child, Orley Buck, the fact that he was on the car at the solicitation of defendant's agent and in his charge, that with the consent and full knowledge of said servant he attempted to alight from a peculiarly dangerous part of the car under the very eyes of the servant, the evidence shows conclusively the grossest negligence and the most culpable disregard of the dictates of ordinary prudence and care upon the part of the servant after he became aware of the intention of the child to alight, and of his dangerous position in so doing, and eliminates every

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element of contributory negligence if any there was. *Donahue v. Railroad*, 91 Mo. 365; *Werner v. Railroad*, 88 Mo. 368; *Kelley v. Railroad*, 75 Mo. 140; *Frick v. Railroad*, 75 Mo. 61; *Zimmerman v. Railroad*, 71 Mo. 484; *Harlan v. Railroad*, 65 Mo. 26; *Isabel v. Railroad*, 60 Mo. 475. (3) The allegation of the question of service is, "and has and will be deprived of the services of his said son of the value of $4,000, to plaintiff's damage in the sum of $4,000." This is a distinct and clear allegation, both that the son owed services, and that they were lost to the father. If, however, the petition does not state the relation of master and servant as fully as it should, the objection should have been made, as it was not, in the trial court so that an amendment could have been effected; it comes too late after verdict, and for the first time in this court. *Spurlock v. Railroad*, 93 Mo. 538; *Grove v. City of Kansas*, 75 Mo. 672; *Berthold v. Ins. Co.*, 2 Mo. App. 311; *State v. Court*, 51 Mo. 522. See also reasoning of Judge THOMPSON, in *Matthews v. Railroad*, 26 Mo. App. 85. (4) Respondent's instruction, numbered 3, read in conjunction with appellant's instruction, numbered 3, and the court's instructions, numbered 12 and 13, presented the law as fully and favorably as appellant could well ask. (5) The cases of *Smith v. City of St. Joseph*, 55 Mo. 456, 459; and *Frick v. Railroad*, 75 Mo. 542, sanction fully the action of the court in giving instruction, numbered 5, asked by respondent on the rule of damages.

SMITH, P. J.—This is an action by the plaintiff against the defendant, a street railway company, for damages for an alleged injury to his infant son, Orley, who was at the time alleged about six years old. The material allegations in the petition are, that while said Orley was a passenger on appellant's car he attempted to alight from the front platform of the car, but, before

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he had time and opportunity to safely alight therefrom, the driver of said car suddenly, carelessly and negligently started said car forward and caused it to run against and over him, injuring and mangling his leg, rendering him a cripple for life, "by reason whereof plaintiff has laid out and expended large sums of money, to-wit, $1,000, for nursing, drugs and medical attendance for his said son; and has and will be deprived of the services of his son of the value of $4,000."

The answer is a general denial, and it further alleges, that, if the plaintiff was damaged, it was solely on account of his own negligence and the negligence of said Orley contributing directly thereto. The plaintiff had judgment for $1,100, and from which defendant appealed.

I. The defendant here assaults the judgment on the ground that the petition does not state facts sufficient to constitute a cause of action. The specific objection being, as we understand it, that the petition does not expressly allege that the plaintiff's child was his "servant" at the time of the injury. While it is true the petition fails to allege this fact, it does allege by reason of the injury that plaintiff will be *deprived of the services of his child, etc.*, as the petition states that the child is an infant, only six years old, and that the plaintiff is his father, and that in consequence of the injury received by the child that the plaintiff would be deprived of his services. We would have supposed these allegations sufficient without the express averment that the child was plaintiff's servant. The allegation that the plaintiff is the father of the child, and that the services of the latter have been, or will be, lost to the former in consequence of the injury, furnish an ample base for the inference that the child is, or was, the father's servitor. The right of action to recover for the services of the child is presumed to be in the father—is *prima facie* in him. Schouler's Domestic Rel., sec.

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251; *Monughan v. School Dist.*, 38 Wis. 100; *Campbell v. Cooper*, 34 N. H. 49. It seems to us that the underlying principle of this doctrine is, that the father's obligation to support, and his right to receive wages, commence together, and ought always to terminate together. This obligation and right are correlative. The latter grows out of the former. *Campbell v. Cooper*, 34 N. H., *supra*. This presumptive right of action in the father for services of the child would, no doubt, continue until it be shown that the father had emancipated the child or waived his right to his services, or for some other reason is not entitled thereto, and this would be a matter of defense. According to the principles just stated, it seems to us that the facts stated in the petition are sufficient to entitle the plaintiff to recover for the loss of the services of his infant son.

In the light of the ruling made by the St. Louis Court of Appeals in *Matthews v. Railroad*, 21 Mo. App. 188, the allegation here that plaintiff has been deprived of his child's services renders the petition sufficient. The majority of the judges of the same court, however, in *Matthews v. Railroad*, 26 Mo. App. 75, declared that the petition in that case stated no ground for the recovery of damages, "in respect of loss of services, because it was not alleged the child was the *servant* of the plaintiff at the time of the injury. This rule of pleading is invoked by the defendant here for the first time, but owing to the state of the record, as we shall presently show, it is inapplicable to a case of this kind, so that it is not necessary for us to express our views of this rule further than has been already intimated.

If the petition was defective from the reason contended by defendant, it should have seasonably objected to the introduction of evidence to support the allegation defectively made. The failure, as was the case, to make this objection in the court below, where it could have been met by an amendment, must be here held to operate as a waiver of that objection. Both under the

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common law and the statute, when anything is omitted in the declaration or petition, though it be a matter of substance, if it be such that, without proving it at the trial, the plaintiff could not have had a verdict, and there be a verdict for plaintiff, such omission shall be no cause for arresting or reversing the judgment. Tidd's Practice, 979; R. S., sec. 2113. A verdict will aid a title defectively set out, but not a defective title, or, in other words, nothing is to be presumed after verdict but what is expressly stated in the declarations or necessarily implied from the facts stated. Bliss on Code Pleading, sec. 438; Tidd's Practice, 919; 1 Saunder's Rep. 228, note 1.

The rule is now well established by the adjudications in this state that, if a material matter is not expressly averred in the pleading, but is necessarily implied from what is stated therein, the defect is cured by verdict in favor of the party pleading. If the defendant in such case pleads to the merits he thereby waives the objection to the mere formal defects, and will not be heard at the trial, or on appeal, to object that the petition does not state a cause of action. Such an objection can only be interposed when the petition fails to state any cause of action, not where one is defectively stated. *Grove v. City of Kansas*, 75 Mo. 672; *Bavie v. Kansas City*, 51 Mo. 454; *Elpart v. Seiler*, 54 Mo. 134; *Sparlock v. Railroad*, 93 Mo. 538; *Berthold v. Ins. Co.*, 2 Mo. App. 311; *State v. County Court*, 51 Mo. 522. The worst that can be said of plaintiff's petition is, that it defectively stated the plaintiff's title to the right of action, not that it wholly failed to state a title at all, and, therefore, it is not subject to the objection that it did not state a cause of action.

II. The defendant further contends that the circuit court erred in refusing to direct the jury that, under the law and the evidence, the plaintiff was not entitled to recover. The defendant urges as grounds in support of this contention, that the evidence fails to show

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any such negligence on part of defendant, but does show such contributory negligence as ought to defeat the plaintiff's alleged cause of action. We do not so understand the evidence. That part of it tending to show that the plaintiff's son, while riding on the front platform of the car with the driver, who, it seems, occupied the dual position of conductor and driver of the car, told the latter when the car reached the block in which he lived that he wanted to get off there; that thereupon the driver slowed up the car to nearly a standstill, and that *while the boy was in the act of alighting from the front platform thereof*, where he had been received and was standing, the car gave a sudden jerk or lurch forward, throwing him off the platform, and under the car, was, in our opinion, sufficient to authorize the submission of the case to the jury on the question of defendant's negligence. *Muehlhausen v. Railroad*, 91 Mo. 332. Especially does this appear to be so, in view of the fact that the plaintiff's son, while under the very eyes of the driver, and with his full knowledge and consent, was permitted to get off from the most dangerous part of the car, and, while so doing, the car was suddenly started forward, which resulted in the injury complained of.

Negligence cannot ordinarily be imputed to a child of the age of six years, for it would not be presumed of sufficient capacity or discretion to understand the danger of getting off and on street railway cars, and to guard against it. *Railroad v. Caldwell*, 74 Pa. St., *supra*. It was within the scope of the employment of the driver, who was the conductor of the car in question, to receive passengers on the car and let them off. *Wilton v. Railroad*, 107 Mass. 108; *Rairdon v. Railroad*, 104 Mass. 117.

The plaintiff's son was received as a passenger. This fact cannot be affected by the omission of the driver to demand or collect fare. He was a full-fledged passenger, and as such he was entitled to the same protection, and to have the car managed with as much care, as if he had paid his fare. *Muehlhausen v. Railroad*,

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91 Mo. 332; *Sherman v. Railroad*, 72 Mo. 63; *Wagner v. Railroad*, 97 Mo. 512; *Wilton v. Railroad*, 102 Mo. 108; *Wilton v. Railroad*, 105 Mo. 130; *Railroad v. Wheeler*, 35 Kan. 185; *Railroad v. Muhling*, 30 Ill. 9. In the case at bar, the invitation to the plaintiff's son to ride was an act within the general scope of the driver's employment, and, if the boy accepted it innocently, he was not a trespasser. It follows that, if the plaintiff's son being lawfully upon the car using due care for one of his years at the time of the injury, the defendant is liable for such injury, if it was occasioned by the negligence of the driver.

The plaintiff's son sustaining to defendant the relation of passenger at the time of the injury, the common-law liability of the defendant attached. Defendant owed him, as such passenger, the duty to exercise the highest possible degree of care and vigilance in the conduct and management of its cars in every particular, with the view to his safety, without reference to whether he was a passenger for hire or a free passenger. Beach on Contributory Neg. 153, and cases there cited; *Kelley v. Railroad*, 70 Mo. 604; *Price v. Railroad*, 72 Mo. 414. And for the slightest negligence or carelessness in these respects the defendant is liable. *Lemon v. Chanslor*, 68 Mo. 340; *Railroad v. Hust*, 93 U. S. 291; *Jacobs v. Railroad*, 20 Minn. 125; *Railroad v. Derby*, 14 How. (U. S.) 468.

While the plaintiff's son was in the act of alighting from the defendant's car there was a sudden jerk, or forward movement, which threw him off the platform and caused his injury. This constituted a breach of defendant's duty, and, for any injury arising therefrom, there would be liability. And whether there was a breach of the duty, of which there was some evidence, was a question for the jury.

In *Railroad v. Bohn*, 27 Mich. 503, it was said "a railway car, however, is not supposed to be a dangerous vehicle of conveyance to those who take it * * *.

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A mother, who consents to her infant children going upon the cars, is supposed to know that it is a reasonably safe conveyance. She may also be supposed to know that the proprietors have regulations which preclude persons riding in unsafe positions upon it, and that the persons in charge have authority to enforce these regulations. She will, therefore, with reason expect that her children, if they lack judgment to decide for themselves what the dangerous positions are, will be warned and kept out of them by the authority of those in charge. Under such circumstances the mother may, with the utmost confidence, intrust her children to the street car on the supposition that, instead of sending them into unusual danger, she has actually placed them where they will be safer than upon the public streets on foot. She can consequently be guilty of no negligence in permitting them to take cars by themselves, if they have reached the age which would justify them being suffered on the public streets." If the plaintiff consented to his son accepting the invitation of the defendant's driver to ride on the defendant's car, the former had a right to presume that the driver would assign his son to some safe place on the car, instead of needlessly exposing him to the risk and peril of riding on, and getting off, the front platform of the car. It seems to us that under the circumstances of this case, that the plaintiff's son was a special passenger, and that the defendant's driver owed plaintiff and his son the duty of extraordinary care and vigilance for his safety.

The defendant's further insistance is, that the parents of the boy were guilty of contributory negligence in consenting that he ride upon the defendant's car; that had it not been for their consent the boy would not have accepted the invitation of the driver, and so would not have been upon the defendant's car and injured by reason thereof. Admitting that the plaintiff was guilty of negligence in thus giving the boy

license to ride on defendant's car, still ought this fact to preclude his recovery. Manifestly not, unless this negligence contributed to the injury. To be thus contributory, in a legal sense, it must be the direct and the proximate cause of the injury; that is, it must have been near in the order of causation (Shearman & Redfield on Neg. 37-38), and must have contributed, to some extent, directly to the injury, and must have been not a mere technical or formal wrong, contributing either incidentally or remotely or not at all to the injury. *Isbee v. Railroad*, 27 Conn. 303; Redfield, Railway Cases, 485, 490. Now, notwithstanding the negligence of the plaintiff in consenting that the boy ride on defendant's car, and that the latter would not have been injured had he not been there, his presence there, with the knowledge and consent of the defendant's driver and conductor, made it the duty of defendant to exercise care to avoid injuring him while there, or while endeavoring to leave the car. If the boy was injured from the want of such care, *i. e.*, negligence on defendant's part, such negligence and not that of plaintiff in consenting that the boy ride on the car, or to his presence there, was the immediate and direct, the mere proximate, cause of the injury, and defendant is liable therefor. *Huelsenkamp v. Railroad*, 37 Mo. 537; *Root v. Car Co.*, 28 Mo. App. 199; *Ashbrook v. Railroad*, 18 Mo. App. 290; *Bell v. Railroad*, 86 Mo. 599; *Rine v. Railroad*, 88 Mo. 392; *Jacobs v. Railroad*, 20 Minn. 125; *Railroad v. Elliot*, 4 Ohio St. 476; *Keith v. Pinkham*, 43 Me. 503; *Richmond v. Railroad*, 18 Cal. 351; *Railroad v. Chenowith*, 52 Pa. St. 386; Shearman & Redfield on Neg., sec. 25.

Not only do we think there was sufficient evidence to authorize the submission of the case to the jury on the question of defendant's negligence, but the evidence did not show that kind and degree of contributory negligence that would preclude plaintiff's recovery.

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III. The defendant further complains of the action of the court in giving the plaintiff's first instruction, on the ground that it ignores the question as to whether the plaintiff's boy was his servant at the time of the injury, and whether he lost his services by reason of such injury. As to this objection, it is sufficient to say that what was remarked in the first paragraph of this opinion is a complete answer to it. There was no assumption by this instruction of any fact not within the pleadings. The evidence tended to show every fact embraced within its hypothesis. The uncontradicted evidence shows that the plaintiff's son was in so far his servant that he was entitled to his services. There was nothing in the least tending to show that he was not so entitled. It is never error in an instruction to assume a fact not contradicted in the evidence. *Bart v. Hatch*, 98 Mo. 378; *Carroll v. Railroad*, 88 Mo. 239.

This instruction, when read in connection with the others for plaintiff, fairly submits the case under the pleadings and evidence. *Muehlhausen v. Railroad, supra; Whalen v. Railroad*, 60 Mo. 323; *Karl v. Railroad*, 55 Mo. 476.

IV. The defendant's further complaint is that the plaintiff's third instruction ignored the defense of contributory negligence. This defense was not in the case further than it was disclosed by the evidence of the plaintiff. We have already decided that it did not tend to show that the plaintiff or his child was guilty of any such contributory negligence as would bar plaintiff's recovery. The defendant did not introduce any evidence to sustain this defense. The plaintiff's instructions, therefore, very properly omitted any reference to it. This instruction was not erroneous in directing the jury that, if the defendant's car driver could have, by the exercise of reasonable care and prudence upon his part, prevented the injury, the defendant was liable. "Reasonable care and prudence" imply the converse of negligence. Now, if the jury found from the evidence

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that the injury, the result of the act, could have been prevented, had the car driver exercised reasonable care and prudence, would not the charge in the petition have been sustained? This would have been equivalent to finding that the defendant's car driver had been negligent in the discharge of his duty to plaintiff's son.

VI. The defendant finally complains of the action of the trial court in giving the plaintiff's fifth instruction which informed the jury that, if they find for the plaintiff, they will assess his damages at such sum as they may believe from the evidence will be a fair compensation for the loss of service, if any, already sustained, and for the loss of service, if any, in the future, to the time of the arrival of the plaintiff's son at the age of twenty-one, if they further find from the evidence, taking into consideration the nature and character of the injury sustained, that plaintiff will suffer any loss of his son's service to that date; and such further sum as they may find from the evidence will be a reasonable and fair compensation for necessary medicines, medical attendance and nursing expended and paid out or contributed to be expended or paid out by plaintiff. This instruction was authorized by the evidence and the law as it is established in this state. The rule is that, when a child has been injured through the negligence of another, the father is entitled to recover, as damages, an amount which will fully compensate him for the loss of service and care of the child and the expense resulting from the injury, for a period not extending beyond the majority of the child, including surgical attention, care, nursing, medicine and the like. *Frick v. Railroad*, 75 Mo. 542; *Smith v. Railroad*, 55 Mo. 446; *Dunn v. Railroad*, 21 Mo. App. 188. The evidence showed that plaintiff had paid about $600 for surgical attention and medicine for the boy; that the services of a nurse for him during the time required was reasonably worth from $1 to $3 per day; that the boy was confined to his bed about three months during which he required careful nursing. The plaintiff the only witness who

testified as to the effect of the injury, which one of the doctors stated was of a permanent character, would have on the value of the boy's services until he should attain his legal majority, stated that it would be diminished one-third, and that the services of a boy like his would be, for the time just stated, of the value of from $2,000 to $2,500. There was no objection preserved to this, or any other evidence offered. So that we cannot say there was no evidence upon which to base the instruction. Nor do we think the verdict, in view of the uncontradicted evidence, is by any means excessive.

VI. The instructions given by the court on its own motion, with those given at the instance of defendant on its behalf, were exceedingly favorable to defendant. We can discover no error in the action of the court in refusing ten of the instructions asked by defendant. The principles they asserted were either embraced in others given, or they were erroneous and inapplicable to the case.

VII. We think the examination of the boy as to his competency as a witness fully demonstrates the propriety of the action of the court in permitting him to testify. We see nothing in his examination that in the least calls for any interference by us with the action of the court.

The judgment of the circuit court will be affirmed. All concur.

JOHN E. M. TRIPLET, Respondent, v. JOHN P. RANDOLPH *et al.*, Appellants.

Kansas City Court of Appeals, November 9, 1891.

1. **Principal and Surety:** DISCHARGE: ESTOPPEL. A creditor, who on being informed by one of his debtors known to be a surety, that the debt can be made of the principal, and that he is unwilling to remain longer liable, replied that the debt was about to be | 46 569 | 55 680

secured, and, if security was given, the time would be extended; but, if not given, suit would be brought, and the surety should take no further action in the matter; and later informed the surety the matter was arranged, is estopped to further hold the surety.

2. ——— : ——— : WAIVER OF WRITTEN NOTICE TO SUE. If a creditor, knowing one of his debtors to be a surety for the other, and that he is about to give him legal notice to bring suit, by his conduct prevents the notice from being given, which, if given and acted upon, would have caused the bringing of the suit and the collection of the note, discharges the surety, though no suit is brought, and the principal becomes insolvent.

Appeal from the Chariton Circuit Court.—HON. G. D. BURGESS, Judge.

REVERSED AND REMANDED.

C. Hammond & Son, for appellants.

(1) Part of the contract of the sureties on a promissory note is the statutory right to notify the payee to sue to the principal, after an action has accrued, and, if suit is not brought within thirty days after notice, to be exonerated from liability. The right of the payee, in this regard, is to have this notice in writing. R. S., secs. 8343, 8344. It is not contended that a verbal notice to sue, with nothing more, is sufficient. It is contended that a payee may waive his right to notice in writing. Bigelow on Estoppel [5 Ed.] ch. 20, p. 661, and following. A statutory provision may be waived. *In re Cooper*, 93 U. S. 507. (2) Appellants as securities of McClelland were about to take steps to secure themselves from loss. It was then in their power to do so. They so informed respondent, and he promised them that he would arrange the matter with McClelland, and afterwards sent them word that he had arranged it. They were thus prevented from taking steps they otherwise would have taken to secure themselves. These facts fulfill all the conditions of estoppel by conduct, as applied to this class of cases. *White v. Walker*, 31 Ill.

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422, 437; *Baker v. Briggs*, 8 Pick. 122; *Harris v. Brooks*, 21 Pick. 195; *Bank v. Klingensmidt*, 7 Watts, 523; *Carpenter v. King*, 9 Metcalf, 511; *Hogeboom v. Herrick*, 4 Ver. 131; *Weinstein v. Bank*, 5 Am. St. 23; *Oden v. Hendrick*, 100 Mo. 538.

R. H. Musser and *Tyson S. Dynes*, for respondent.

(1) The neglect of the creditor to collect the bond or note from the principal debtor will not discharge the surety from his liability, unless he give notice according to the statute. *Cain v. Bates' Adm'r*, 35 Mo. 427; *Petty v. Douglass*, 76 Mo. 70; *Miller v. Mellier*, 59 Mo. 388; *Langdon v. Markle*, 48 Mo. 357; *Osborne & Co. v. Lawson*, 26 Mo. App. 549. (2) There is no waiver of the notice required by the statute. To waive a statutory right, the parties must make a new contract based upon some new consideration. This contract cannot be made by estoppel; nor can a promise or executory obligation be made subject of estoppel. *Hosea v. Rowley*, 57 Mo. 358; *Osborne v. Lawson*, 26 Mo. App. 349. (3) It is no defense to this action that plaintiff promised to take other security. If the sureties had desired anything of that kind they should have taken it for themselves. (4) To constitute an estoppel by conduct, the respondent must have asserted or represented some fact which his mouth is stopped from denying, and, on these assertions, the appellants must have acted to their detriment; and the facts must have been some fact of respondent's peculiar knowledge. "The first element of estoppel by conduct is that there must have been a false representation or a concealment of natural facts." *St. Louis v. Lumber Co.*, 98 Mo. 613. (5) The elements of equitable estoppel are: "*First.* There must have been a false representation or concealment of actual facts. *Second.* The representation must have been made with knowledge of the facts. *Third.* The party

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to whom it was made must have been ignorant of the truth of the matter. *Fourth.* It must have been made with the intention that the other party should act upon it. *Fifth.* The other party must have been induced to act upon it." *Blodgett v. Perry*, 97 Mo. 273. (6) An estoppel *in pais* is a moral question. *Delaplain's v. Hitchcock*, 6 Hill, 17. This doctrine of estoppel always presupposes error on one side and fault or fraud upon the other. *Morgan v. Railroad*, 96 U. S. 716; *Galbreath v. Newton*, 30 Mo. App. 380.

Ellison, J.—Randolph and Riddle were sureties on a promissory note given to plaintiff by McClelland. Plaintiff has sued all three. The sureties filed an answer which was not considered by the court as a defense, and judgment was rendered on the pleading for plaintiff. The sureties appeal.

The answer is subject to criticism for lack of clearness, but it sets up matter which may be divided into two defenses, *first*, that plaintiff by his conduct had waived the statutory thirty days' written notice to sue; and, *second*, that plaintiff had caused them to forego securing themselves at a time when they could have done so. That, McClelland afterwards becoming insolvent, they were unable to protect themselves. The latter defense, in our opinion, is good. In *Carpenter v. King*, 9 Metcalf, 511, it is decided that when a creditor, who knows that one of his debtors is a surety, tells the surety that the debt has been paid, and in consequence the surety forbears obtaining security which he might and would have obtained but for such information from the creditor, he is discharged. See also *Driskill v. Mateer*, 31 Mo. 325. This principle is directly applicable to this case. The answer when taken as a whole alleges in substance that Randolph and Riddle went to plaintiff and told him that the note could then be collected from McClelland; that they were unwilling to remain longer liable; that plaintiff in reply assured

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them that McClelland had promised to give him security on real estate, that if he did so plaintiff would give him further time, that if he did not do so, or otherwise arrange the matter, plaintiff would at once proceed to collect the note, and that it would not be necessary for them to take any further action in the matter; that plaintiff afterwards sent them word that they need not be uneasy about the note as he "had arranged the matter with McClelland;" that, but for being thus misled they could have secured themselves against loss on account of the note; that McClelland afterwards became insolvent, and that plaintiff is estopped from claiming anything from them. This we think constitutes a good defense.

II. We are not satisfied as to that portion of the answer referring to the failure to give the thirty days' written notice, but, as the case is to be remanded, it is not necessary to go into an extended criticism; and, as it may be amended so as to be made more definite and certain as to what was said and done by the parties with reference to a notice, we will add that if the sureties told plaintiff that they intended to give him written notice to commence suit on the note, and he replied to them that McClelland was going to secure it; that, if he did not do so, or otherwise satisfactorily arrange it he, plaintiff, would proceed at once to collect; and, that afterwards he sent them word that he had arranged the matter satisfactorily; and, in consequence of this, they failed to give the notice which they otherwise would have given, and that the note could have been collected from McClelland if suit had been commenced and diligently prosecuted, but could not afterwards be collected on account of McClelland becoming insolvent,—in other words, if the creditor, knowing one of his debtors to be a surety for the other, and that he was about to give him legal notice to bring suit, by his conduct prevents the notice from being given, which, if given and acted upon, would have caused the bringing

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of the suit and the collection of the note, but which not being done, and the principal becoming insolvent, it cannot afterwards be collected, discharges the surety. Such condition of the case, it seems to me, would meet the necessary requisites of an estoppel.

The judgment is reversed and the cause remanded. All concur.

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MRS. M. S. GREGORY, Appellant, v. THE WABASH RAILWAY COMPANY, Respondent.

Kansas City Court of Appeals, November 9, 1891.

1. **Common Carriers**: WHEN LIABILITY ATTACHES: DELIVERY OF GOODS. If goods are delivered to a railroad company for transportation without more, the liability of the carrier attaches, and this means an insurance, a responsibility for every loss, save only such as result from the acts of God or the public enemy; but, if the delivery is for storage for a certain or indefinite time, the carrier becomes a mere depository or bailee until the appointed time has expired.

2. ——: ——: ——. A delivery to the carrier with the name and address of the consignee marked upon the goods is, in the absence of some directions or agreements otherwise, equivalent to an express direction to transport them to such consignee *at once*; and, on a review of the testimony in this case, it is *held*, there is some evidence tending to prove a delivery for immediate shipment and amply justifying a submission of the case to the jury.

Appeal from the Chariton Circuit Court.—HON. G. D. BURGESS, Judge.

REVERSED AND REMANDED.

Tyson S. Dynes, for appellant.

(1) The uncontradicted testimony, admitted by the demurrer to be true, is that the goods were delivered

to the carrier, at its depot, boxed and marked for shipment, and, as an incident, prior to the shipment, placed by the order of the agent of the carrier in its freight-room. This was delivery to the carrier, and the liability of common carrier began at the time of such delivery. *Mason v. Railroad*, 25 Mo. App. 473; *Railroad v. Kirkwood*, 9 Am. & Eng. R. R. Cases, 85; *Railroad v. Smyser*, 38 Ill. 354; *Grosvenor v. Railroad*, 39 N. Y. 34. (2) Deposit of goods in a warehouse as accessory to the carriage, and for the purpose of being carried, imposes upon the carrier the liability of a carrier and not that of a warehouseman. 2 Am. & Eng. Ency. of Law, 804; *Blossom v. Griffin*, 3 Kern (N. Y.) 569; *Mason v. Railroad*, 25 Mo. App. 473. (3) And it makes no difference whether any bill or entry in the books of the company is made. Hutch. Carriers, secs. 97, 99, pp.74,76. Where carrier agrees to transport, the promise to pay what the carriage is reasonably worth arises by implication of law. *Gray v. Packet Co.*, 64 Mo. 47. (4) If goods on deposit in carrier's warehouse, awaiting shipment, are destroyed by fire, the carrier is liable to the same extent as if the goods were in transit, unless that liability has been modified with the consent of the owner of the goods shipped. 2 Am. & Eng. Ency. of Law, p. 804; 3 Am. & Eng. R. R. Cases, 256; 18 Am. & Eng. R. R. Cases, 527. (5) Whether or not the goods were intended for early shipment was a question for the jury, and the court should not have given the instruction in the nature of a demurrer, unless there was no evidence that the goods were for early shipment. *Thomas v. Express Co.*, 30 Mo. App. 86; *Groll v. Trower*, 85 Mo. 251. (6) If the jury could have reasonably inferred, from the evidence, the essential fact of delivery to the carrier for shipment, the demurrer should not have been given. *Zwisler v. Storts*, 30 Mo. App. 163; *Twohey v. Fruin*, 96 Mo. 104; *Taylor v. Short*, 38 Mo. App. 21. The jury, and not the court, must pass on any conflict in the testimony.

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Brown v. Railroad, 99 Mo. 310. (7) The demurrer to the evidence admitted not only the truth of the facts testified to, but every reasonable inference that may be drawn therefrom. *Jackson v. Ins. Co.*, 27 Mo. App. 62; *Huckshold v. Railroad*, 90 Mo. 548.

George S. Grover, for respondent.

As the evidence fails to show a delivery of the goods sued for to the defendant, for immediate transportation, the defendant was a mere depository, and, therefore, not liable as a carrier. For that reason the ruling of the court below was correct. Hutchinson on Carriers, secs. 63, 88, and cases cited; Story on Bailments, sec. 537, and cases cited; *O'Neil v. Railroad*, 60 N. Y. 138, and cases cited; *Watts v. Railroad*, 106 Mass. 466, and cases cited; *Busching v. Gaslight Co.*, 73 Mo. 219; *Mason v. Railroad*, 25 Mo. App. 473.

GILL, J.—Mrs. Gregory, the plaintiff, while changing her residence, on February 28, 1890, sent to the depot of defendant at Brunswick two wagonloads of household goods, consisting of a piano and some other articles, boxed and marked "Mrs. M. S. Gregory, Gallatin, Missouri." For some reason, not altogether clear, as will be seen by the evidence hereinafter noticed, the piano and other goods were stored in defendant's depot at Brunswick. This was at about three o'clock P. M., Friday, February 28. On Sunday night following the depot and goods were destroyed by fire, and this suit was brought to charge the defendant as a common carrier for the value thereof. On the trial in the circuit court the court sustained a demurrer to plaintiff's evidence, and, a verdict and judgment being rendered for defendants, plaintiff appealed.

The question is then, admitting the truth of plaintiff's evidence, and every reasonable inference which the jury might draw therefrom, was there a showing that warranted a verdict for plaintiff? The lower court

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held in the negative, and the correctness of that ruling is up for decision here.

The law applicable to this kind of case is now well settled, though it is sometimes difficult to adjust it to the facts of all controversies. It is well understood that if goods are delivered to the railroad company for transportation, without more, then the liability of carrier attaches, and this means an insurance, a responsibility for every loss, save only such as result from the acts of God or the public enemy. Hutchinson on Carriers, section 88, thus clearly states the law: "The delivery must be to the carrier or his agent for immediate transportation; for if the goods be delivered to him to be stored by him for a certain time, or until the happening of a certain event, or until something further is done to prepare them for transportation, or until further orders are received from the owner, the carrier becomes a mere depository or bailee until the appointed time has expired," etc. And again the same author says: "But, if the delivery be made at the warehouse or other place of business of the carrier for as early transportation as can be made in the course of the carrier's business, and subject to only such delays as may necessarily occur in awaiting the departure of trains, * * * or from the performance of prior engagements by him, he becomes, the moment the delivery is made, a carrier as to the goods, and his responsibility as such at once attaches." Hutchinson on Carriers, sec. 89; *Mason v. Railroad*, 25 Mo. App. 479. Now, the point at issue here, upon the facts, is, did the evidence adduced tend to prove that Mrs. Gregory's goods were delivered at defendant's depot at Brunswick for immediate shipment, or for as early transportation as could be furnished by the defendant railroad, *or*, on the other hand, were the goods delivered at the defendant's depot with the understanding that they await other goods to be shipped or the future orders of the plaintiff?

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The shipment of these goods was intrusted to plaintiff's son, R. D. Gregory, who testified as follows: "Previous to March, 1890, I lived within half a mile of Brunswick. My mother moved the seventh of March; I remember taking her household goods to the depot at Brunswick; I think it was Friday, February 28. On the Sunday following, the fire occurred at the depot in Brunswick, and the Wabash depot burned down. Smith Warden and Henry Thompson were with me, taking the goods down. We took a piano at one load, and a box of books, mahogany center table, what-not and a barrel of pork, the goods alleged in the petition. I put them in the freight depot. I went to Benton and told him I had a piano there, and he says, 'Where does it go to?' and I told him it went to Gallatin, on with the other goods, and he says, 'I have not got any car for it now.' I says, 'What shall I do with it?' He says, 'Put it in the freight room.' We got the goods there, and, with the help of Smith Warden and Henry Thompson, I put them in the freight room. Mr. Benton was the station agent of the Wabash railroad at Brunswick. After Benton told me he did not have a car, I put the goods in the freight room. I did nothing further with the goods. They were destroyed by fire on the Sunday night following. We took the first load of goods about twelve o'clock Friday, and the second load about three, and at about half past three the men put them in the depot. He never gave me a receipt for the goods. I told Mr. Benton, at the time of the delivery of the goods, that I had a piano there with some other goods that I wanted to ship to Gallatin, Missouri, and asked him where I should put them. I did not tell him that I wanted them shipped that day. I did not tell him when they were to be shipped. He asked me where they went, and I told him they went to Gallatin." It may be well to say that the other goods referred to the other wagonload, and were brought to the depot a few hours before the piano. Further on in

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cross-examination, this same witness testified that he did not tell the agent, Benton, that he had other goods to ship, didn't tell him anything about it, though he said that he did four days thereafter bring some other goods for shipment to the same place.

Turner, then working for the defendant at the Brunswick depot, testified in substance, that he was at the depot and assisted in placing the goods in the depot freight house; heard the conversation between Gregory and the agent, and that the agent told Gregory that he had no car to put the piano in and to put the goods in the freight house. "I did not hear him tell him to ship them; he told him he had not all there yet. I did not hear him say that he was going to bring the rest of them at the present time." Thompson, another witness, testified: "Mr. Gregory went to see Mr. Benton, and called Mr. Benton's attention to his piano to know where he should put it, but he told him he had no time to attend to it; he would after awhile; to put it in the freight house; Benton was busy; it was near about three o'clock. He told him he was going to ship them, but did not tell him when. I did not hear him tell him about any other goods." Witness Warden was assisting with the goods and he testified: "There was something said about not having a car to put the goods in. Mr. Benton said he would see about it, There was something said to Mr. Benton about shipping them right away, but I don't just remember just what was said."

R. D. Gregory, being recalled, further swore: "When I delivered the goods I told Mr. Benton they went to Gallatin. He said put them in the freight room, he would attend to it later on as he was busy. I did not deliver all the goods at that time. I took them on Monday or Tuesday. I told Mr. Benton to ship the goods when I took them down there first that night. I didn't tell him they were to go that night. I did not

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tell Mr. Benton that they were to go immediately. I never told Mr. Benton anything else than that they were to go to Gallatin."

The foregoing extracts comprise, in substance, all the evidence that tends to show how and for what purpose these goods were left at defendant's depot. Commenting thereon, we have this to say, if this testimony indubitably showed that these goods were, on February 28, left at defendant's depot and stored in the freight house, to await the delivery there of other goods, not then delivered, when all would be shipped together, then it is clear that the Wabash Railroad Company became only liable for negligence as a warehouseman, and as there was no such negligence shown it was proper to direct a verdict for the defendant. But if, on the other hand, the goods were taken to the depot for immediate shipment, and were deposited in the railroad company's storehouse only to await the arrival of a car, and the convenience of the agent, then defendant's liability as a common carrier at once attached, and the holding of these goods thereafter in the depot was no defense to this action. It is no defense to say that the consignor did not in words say, "Ship immediately," as seems to be the argument of defendant's counsel at the oral discussion of this case. "A delivery to the carrier with the name and address of the consignee marked upon the goods is, in the absence of some directions or agreements otherwise, equivalent to an express direction to transport them to such consignee *at once*." Hutchinson on Carriers, sec. 89. There is evidence here tending to prove a delivery for immediate shipment, and that the reason for the delay was not to accommodate the shipper, but rather to subserve the convenience of the railroad company. One witness, it is true, says that there was something said at the time about there being some other goods to ship. But the principal witness for the plaintiff, and the party, too, who attended to the matter for the plaintiff, testified that he said nothing

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to the defendant's agent as to any other goods except those then delivered. Other witnesses swore to the same effect. Nor is there any evidence whatever that the agent had noticed that the plaintiff had other goods to ship. If plaintiff then contemplated the shipment of other goods, it did not necessarily follow that she intended to have all transported at once.

There was nothing said about shipping by one car, no negotiations for chartering a car, or anything of the kind. We are not here now to decide this case on the facts; only to say that as we read the evidence there was ample testimony justifying a submission of the case to the jury.

The judgment, therefore, will be reversed, and the cause remanded for a new trial. All concur.

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THE W. W. KENDALL BOOT & SHOE COMPANY, Appellant, v. JESSE F. BAIN *et al.*, Respondents.

Kansas City Court of Appeals, November 9, 1891.

1. **Evidence:** POSSESSION: OPINION OF WITNESS. In an action of replevin, brought by a third party against a sheriff holding goods under a writ of attachment, it is error to permit a witness to testify that, at the levy of the writ, the attachment defendant was in possession of the goods attached, when the undisputed evidence shows that the possession was at that time a mixed question of law and fact, upon which the opinion of the witness did not throw any light.

2. ——: OPINIONS OF WITNESSES. The competency of a witness' opinion rests upon two necessary conditions: That the subject-matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time; that the facts upon which the witness is called to express an opinion are such as men in general are capable of comprehending and understanding.

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3. **Sales**: DELIVERY: INSTRUCTIONS: LAW AND FACTS. An instruction should not submit to the jury a question of law and fact; and, when the question submitted relates to a sale and delivery of the goods, the court should outline what facts constitute a sale and delivery, and leave it to the jury to say whether the evidence proved these facts. An instruction as asked, and as modified, is passed upon.

4. **Practice**: REPETITION OF INSTRUCTION. Where an instruction is but a repetition of one given it is properly refused.

5. **Debtor and Creditor**: PREFERENCE: HINDERING AND DELAYING OTHERS: INSTRUCTION. A debtor can prefer a particular creditor by direct payment or assignment, if he does so in paying his just demands and not as a screen to secure property to himself; although the effect of such preference is necessarily to hinder and delay other creditors. An instruction to this effect is approved.

6. **Sales**: BILL OF SALE: DELIVERY: TITLE. The title of goods and chattels passes with the delivery of possession under a contract of purchase. A bill of sale subsequently executed is merely evidence of a transfer of title, and not necessary to its completion; and, in this case, the jury should have been informed as to the effect of the bill of sale.

7. ———: ASSENT OF PARTIES: INSTRUCTION. The assent of parties to a sale may be expressed or implied from their language, conduct or silence, etc., and, in this case, it was error not to so instruct the jury.

8. **Replevin**: EVIDENCE: WRIT OF ATTACHMENT: STRANGER: INSTRUCTION. In an action of replevin against a sheriff holding under a writ of attachment by a stranger to the attachment proceeding, the sheriff cannot make a *prima facie* case or question the title of the plaintiff by producing the attachment writ with his levy thereon and the proof of the debt, but must go further and show that the petition, affidavit and bond, as required by the statutes, were filed in a court of competent jurisdiction before the issue of his writ; and it is error to tell the jury that the production of the writ and the levy thereunder was sufficient to entitle the sheriff to the possession of the goods, unless the plaintiff should, by a preponderance of the evidence, show that he was the owner of the goods at the time of the seizure.

9. ———: COMMON LAW: FRAUDULENT CONVEYANCES. At common law the only things essential to a valid sale of personal property were a proper subject, a price, and the consent of the contracting parties, and, when these concurred, the sale was complete, and the title passed, without anything more, except, where the thing sold was part of a mass, it had to be separated; the statute of fraudulent

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conveyances beginning where the common law stopped requires that the transaction, before considered complete so as to effect a change in ownership, should be accompanied by a delivery in a reasonable time, regard being had to the situation of the property, and be followed by an actual and continual change of the possession of the thing sold, and an instruction which goes further than the statute is *held* improper and misleading.

10. Replevin: VALUE AT TIME OF TRIAL. If the defendant prevails in replevin, the value of the goods should be assessed at the time of trial, and not at the time of caption.

Appeal from the Mercer Circuit Court.—HON. G. D. BURGESS, Judge.

REVERSED AND REMANDED.

THE plaintiff's fifth instruction referred to in the opinion is as follows: "5. If the jury believe from the evidence that the witness Campion was largely indebted to plaintiff for goods received of plaintiff, and that plaintiff's agent Gray demanded the stock of goods and tools in controversy of said Campion, and that said Campion after the receipt of the telegram by Gray from plaintiff or plaintiff's secretary, Mr. Marshall, declining to accept said Campion's proposition to keep the stock longer, made no further opposition to allowing plaintiff to take the goods to apply on his debt to plaintiff and informed Mr. Gray that he, Campion, would make no further objection to his taking the goods, and relinquished all control of said goods and tools to said Gray, and that said Gray accepted the same for said purpose and proceeded to pack said goods and tools preparatory to removing the same, then said goods and tools became the property of plaintiff, and defendants could not thereafter lawfully seize the same under the writ of attachment, and your verdict must be for plaintiff."

C. R. Pence and *W. E. Clark*, for appellant.

1. The testimony of the witness Bunn was incompetent and irrelevant, and its admission harmful. It

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amounted to the expression of his opinion on a material issue in the case—a mixed question of law and fact. *Muff v. Railroad*, 22 Mo. App. 584; *Gregory v. Chambers*, 78 Mo. 294; *King v. Railroad*, 98 Mo. 235; *Wetherel v. Patterson*, 31 Mo. 458; *Koons v. Railroad*, 65 Mo. 592; 2 Best on Ev. [Morgan's Ed.] sec. 512. (2) It is the value of the goods at the time of the trial, which must be shown. *Hinchy v. Koch*, 42 Mo. App. 230; *Chapman v. Kerr*, 80 Mo. 158; *Richey v. Burnes*, 83 Mo. 362; *White v. Storms*, 21 Mo. App. 288; *Hoester v. Teppe*, 27 Mo. App. 207. (3) The first instruction should have been given in the form asked by plaintiff. As modified and given by the court it submitted to the jury a question of law. *Speak v. Dry-Goods Co.*, 22 Mo. App. 122; *Estes v. Fry*, 22 Mo. App. 80; *Turner v. Railroad*, 76 Mo. 261; *Hickey v. Ryan*, 15 Mo. 63-67; *Fugate v. Carter*, 6 Mo. 267, 273. (4) The second instruction asked by plaintiff is similar to, though not quite so full as, the first, and the third is particularly applicable to the issues raised by the second answer of defendants, and should have been given. *Estes v. Fry*, *supra; Shelley v. Boothe*, 73 Mo. 74. (5) In view of the fact, appearing in evidence, that there was a bill of sale of the goods, and that the same was not made out until after the goods had been attached, and in view also of the claim of defendants upon the trial as to the effect that proof had upon the question of title at the time of the levy, it was essential that the fourth instruction asked by plaintiff should be given. *Gatzweiler v. Morgner*, 51 Mo. 47. (6) Plaintiff's fifth instruction was based upon the evidence, and fully met every phase of the proof. The court should have advised the jury of the legal effect of the facts as therein set forth. *State to use v. Knapp*, 13 Mo. App. 467; *Davis v. Beason*, 74 Tex. 604; *Bass v. Walsh*, 39 Mo. 199; *Glasgow v. Nicholson*, 25 Mo. 29. (7) It was claimed by defendant that Campion had not consented to the transfer of the goods to the plaintiff at the time of the levy. This was a material

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question, and in view of the evidence the plaintiffs' sixth instruction should have been given. (8) The first instruction for defendants is erroneous because it makes the writ of attachment alone sufficient evidence to entitle the sheriff to the possession of the goods as against plaintiff, and requires preponderating evidence on the part of the plaintiff to overcome it. The writ does not run against the plaintiff but against Campion. The plaintiff is a stranger to it, and claims under an older and better title. The writ alone has no probative force as against the plaintiff. *Matney v. Railroad*, 30 Mo. App. 507; *Jungeman v. Schnaider Brewing Co.*, 38 Mo. App. 458; *Swissler v. Storts*, 30 Mo. App. 160; *Weeks v. Etter*, 81 Mo. 378; *Simons v. Austin*, 36 Mo. 307; *Smith v. Lydick*, 42 Mo. 209; *Noble v. Holmes*, 5 Hill, 194; *Thornburg v. Hand*, 7 Cal. 554; Drake on Attach., sec. 185*a*; *Williams v. Eikenbury*, 25 Neb. 721. (9) The third instruction for defendant is based upon a theory not justified by the evidence. (10) The defendant's fourth instruction fails to recognize the doctrine that an attaching creditor can acquire no greater right in the attached property than the defendant himself possessed when the attachment took place, unless he can show some fraud or collusion by which his rights are impaired. The instruction required that Campion should "have actually parted with the possession of the goods." This was not necessary so far as the defendants in this case were concerned. R. S. 1889, sec. 5178; Drake on Attach., secs. 223, 245, 245*a*; *Coover v. Johnson*, 86 Mo. 533; *Phillips v. Schall*, 21 Mo. App. 450.

R. A. DeBolt and *E. M. Harber*, for respondents.

(1) The testimony of witness, Bunn, as to who was in possession of the property at the time of the seizure under the writ of attachment was proper and right, and the court committed no error in admitting the same over the objection of appellant. *McMillan v.*

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Schweitzer, 87 Mo. 402. (2) The affidavit of appellant against Gray, as to the value of the goods being a part of appellant's pleadings in the case was competent evidence against appellant. *Gould v. Trowbridge*, 32 Mo. 291; *Hall v. Guthrie*, 10 Mo. 621; *Beardlee v. Cinmesch*, 38 Mo. 168; *Shultz v. Hickman*, 27 Mo. App. 21; *Coe v. Craig*, 76 Mo. 619; *Dowzelot v. Gray*, 58 Mo. 75. (3) The court did not err in refusing the instructions asked by appellant, and modifying, and in giving appellant's first instruction as modified. The instruction changed and given by the court fully embraced the principles contended for in the first five instructions, which instruction, with the instructions given on the part of the respondents, fully and fairly presented the law in the case. *State to use v. Brokerage Co.*, 85 Mo. 411; *Bunn v. Fryrear*, 85 Mo. 151; *State v. Kelley*, 85 Mo. 143; *State v. Cooper*, 83 Mo. 698; *State v. Thompson*, 83 Mo. 257; *Ins. Co. v. Hauck*, 83 Mo. 21; *Cooper v. Johnson*, 81 Mo. 483; *Harris v. Lee*, 80 Mo. 420; *Boone v. Railroad*, 20 Mo. App. 232. The appellate courts have repeatedly condemned the practice of asking instructions which are but reflections of each other. *Palmer v. Railroad*, 76 Mo. 217; *Coe v. Griggs*, 76 Mo. 619; *Utley v. Tolfree*, 77 Mo. 307; *Douglass v. Cissna*, 17 Mo. App. 44. (4) The court committed no error in giving respondents' first instruction. It correctly declares the law in the case. Drake on Attachments [3 Ed.] secs. 185-210; *Bruce v. Holden*, 21 Pick. 187; *Sias v. Badger*, N. H. 393; *Nichols v. Patton*, 18 Me. 231; *Palley v. Iron Works*, 4 Allen, 329; *Shadborne v. Sumner*, 16 N. H. 129; *Smith v. Smith*, 24 Me. 555; *Brown v. Davis*, 9 N. H. 76. (5) Respondents' third instruction correctly stated the law, and the court committed no error in giving the same. *Ober v. Carson's Ex'rs*, 62 Mo. 209; *Robins v. Phillips*, 68 Mo. 100; *Wangler v. Franklin*, 70 Mo. 659; *Mathews v. McElroy*, 79 Mo. 202; *Cooper v. Johnson*, 86 Mo. 533. (6) Respondents' fourth instruction properly declares the law as to what

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constitutes a valid sale, and the court rightly gave the same. *Ober v. Carson's Ex'r, supra.* (7) The value of the property was assessed at the time of trial as required by law and the instructions of the court. *Chapman v. Kerr*, 80 Mo. 158-164; R. S. 1889, sec. 7489; *Ingles v. Mudd*, 86 Mo. 216. (8) The amount of the attaching creditor's (Hall) debt being greater than the value of the property in controversy there was no error in giving respondents' fifth instruction. *Kerr v. Drew*, 90 Mo. 147; *Dougherty v. Cooper*, 77 Mo. 528-36; *Long v. Cachell, Adm'r*, 55 Mo. 93; *Nelson to the use v. Luchtemeyer*, 49 Mo. 56; *Dilworth v. McKelvey*, 30 Mo. 149; *Lewis v. Mason*, 94 Mo. 551. Respondents had a right to attach for the whole debt whether it was all due or not. R. S. 1889, secs. 521-522.

Smith, P. J.—The plaintiff, a corporation engaged in the wholesale boot and shoe business, at Kansas City, Missouri, brought this action of replevin to recover possession of a stock of boots and shoes taken from it by the defendant Bain, as sheriff, under a writ of attachment, which had been sued out by defendant Hall, in a suit by Hall against one, J. W. Campion. The goods in controversy had been purchased by Campion from plaintiff, but being largely indebted to plaintiff for the goods, and unable to pay for them, Campion had, as plaintiff claims, transferred the goods to it in payment of his said indebtedness. And plaintiff claimed the ownership and possession of the goods, on the ground that it had accepted and received them back in satisfaction of the debt.

The defendant Hall also claimed that Campion was indebted to him for rent, and his attachment against Campion was levied under the following circumstances: There was evidence adduced tending to show that the plaintiffs sent their agent, C. F. Gray, to Trenton, Missouri, where Campion was engaged in business, with instructions to effect a settlement with him, and for that purpose he was given authority to take the goods

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back, upon agreement with Campion to that effect, and apply the same to the payment of the debt; that Gray arrived on the morning of the eleventh of June, 1889, and as the result of his negotiations with Campion it was agreed that the goods should be so applied; that the goods were invoiced by Gray and Campion. Upon the completion of the invoice on the twelfth day of June, the packing of the goods was begun, Campion assisting in the work; that the packing was completed on the thirteenth by two or three o'clock in the afternoon, and most, if not all, of the boxes in which the goods were packed were then carried by Gray into a back room of the store preparatory to sending them to the depot for shipment, and that an hour or two thereafter, but before the goods were removed from the back room, the attachment was levied.

There was a trial, and judgment for defendants, plaintiff appealed. The plaintiff has assigned numerous errors on account of which it is claimed we must reverse the judgment. We shall notice these in the order of their presentation.

I. The plaintiff contends that the trial court erred in permitting the following questions to be asked by defendants, and answered by the witness Bunn: "*Q.* State to the jury who had possession of the goods at the time the writ of attachment was levied on them? *A.* Mr. Campion was in possession of the goods in controversy at the time of the levy of the attachment." It is needless to say that this question called forth from the witness the expression of his opinion on a material and dominating issue in the case. As to whether the plaintiff or Campion was in possession of the goods at the time of the levy of the attachment, was a mixed question of law and fact upon which the opinion of the witness did not throw the least light. The general rule is that witnesses must state facts, not opinions, except in those cases where experts are allowed to state opinions. As it is said in *Commonwealth v. Sturtevant*, 117 Mass.

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122, "the competency of this evidence rests upon two necessary conditions, *first*, that the subject-matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time; and, *second*, that the facts upon which the witness is called to express an opinion are such as men in general are capable of comprehending and understanding." Neither of these conditions obtained in this case. The witness' opinion furnished the jury no means of ascertaining the disputed fact. It was not competent evidence and should not have been received. *Muff v. Railroad*, 22 Mo. App. 584; *Gregory v. Chambers*, 78 Mo. 294; *King v. Railroad*, 98 Mo. 235; *Koons v. Railroad*, 65 Mo. 597; Best on Evidence, sec. 512. *McMillan v. Schweitzer*, 87 Mo. 402, though cited by defendants, is not in conflict with the authorities just cited. It recognizes the rule they all announce.

II. The plaintiff contends that the court erred in refusing the following instruction asked by it: "1. If the jury believe from the evidence that before the levy of the attachment one J. W. Campion being the owner and in possession of the goods in controversy, and being at the time indebted to the plaintiff in the sum of $1,968.38, or thereabouts, was requested by plaintiff's agent to deliver to him for the plaintiff the goods in controversy in whole or part payment of his, said Campion's, indebtedness to plaintiff, and that said Campion assented thereto and relinquished further control over said goods, and the agent of plaintiff accepted the same and had packed the said goods in boxes and had removed the same to a back room of said Campion's store before the levy of the attachment on said goods by the sheriff as the property of said Campion, then the jury are instructed that the plaintiff is entitled to the possession of said goods as against the said attachment, and your verdict should be for the plaintiff." This instruction was amended by the court

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on its own motion, by striking out the word "relinquished," and inserting in lieu thereof the words "did sell, deliver and relinquish."

As to whether given facts in law constitute a "sale" or "delivery," or both, of personal property, is oftentimes a question of much difficulty.

The court, in view of the evidence adduced, should have outlined to the jury what facts constituted a sale and delivery of the goods, and then left it to the jury to say whether the evidence proved these facts. There was no instruction even giving an abstract definition of the interpolated words. The instruction as modified submitted to the jury a mixed question of law and fact for their determination. This was improper. *Speaks v. Dry-Goods Co.*, 22 Mo. App. 122; *Estes v. Fry*, 22 Mo. App. 80; *Turner v. Railroad*, 76 Mo. 261; *Fugate v. Carter*, 6 Mo. 267; *Hickey v. Ryan*, 15 Mo. 63; *State v. Mitchell*, 98 Mo. 657. The instruction as asked presented an intelligent and proper rule for the guidance of the jury, and should have been given.

III. The plaintiff's second instruction was but a repetition of the first, and was properly refused for that reason.

IV. It is further contended that the court erred in refusing the following instruction asked by plaintiff: "3. If the jury believe from the evidence that one Campion was justly indebted to plaintiff, and to satisfy such indebtedness turned over to plaintiff's agent the stock of goods in controversy to apply on or satisfy plaintiff's claim and relinquish all control as owner of said goods, then said Campion had lawful right to so turn over said goods and apply all of his property, if necessary, towards the satisfaction of said indebtedness to plaintiff, although such appropriation of his property may hinder, delay or defer other creditors, and the verdict must be for plaintiff although the plaintiff's agent Gray and said Campion, or either of them, were

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trying to keep defendant Hall from knowing of the transfer of the goods or of their removal."

In this state the law is well settled that a debtor may give preference to a particular creditor or set of creditors by a direct payment or assignment, if he does so in paying his or their just demands, and not as a mere screen to secure the property to himself. The right of a debtor to prefer one creditor over another necessarily implies the right of such creditor to accept such preference. While the effect of such preference must, to the extent that it is made, necessarily be to defer, hinder or delay other creditors, the mere knowledge of the preferred creditor that such will be its effect, and the debtor intended it should have that effect, will not be sufficient to avoid the transaction as to such preferred creditor. *Shelley v. Boothe*, 73 Mo. 74; *Estes v. Fry*, 22 Mo. App. 122. The evidence was undisputed that Campion was justly indebted to plaintiff in an amount as great or greater than the value of the goods in controversy. Plaintiff's good faith was not in the slightest degree impeached. It is nowhere intimated that plaintiff, in purchasing the goods, did so with the intent and design to assist Campion in defrauding his creditors. Its efforts were directed toward obtaining the goods in satisfaction of a just debt. Whether the goods were delivered by Campion to plaintiff's agent for that purpose, or whether delivered at all, was a question of fact for the jury under appropriate instructions. Instruction, numbered 3, should have been given.

V. The fourth instruction asked by plaintiff, to the effect that a bill of sale is not necessary to pass title to personal property, and that if Campion had, before the seizing by the sheriff, relinquished to the plaintiff's agent, Gray, all control of the goods, with the understanding that the same should be applied to plaintiff's claim against him, and that Gray accepted the goods

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on said claim and assumed control, that the verdict should be for plaintiff, ought to have been given.

The jury should have been informed as to the effect of the bill of sale. It was executed after Campion is claimed to have delivered the goods to plaintiff. The title to goods and chattels passes with the delivery of possession under a contract of purchase. A bill of sale subsequently executed is merely evidence of a transfer of title, and not necessary to its completion. The instruction should have been given. *Gatzweiler v. Morgner*, 51 Mo. 47.

VI. The plaintiff's fifth instruction, while in the main it was a little more than a duplicate of its first, might have been properly given. If the jury found from the evidence the facts embraced in its hypothesis, no reason is perceived why plaintiff should not have recovered.

VII. The plaintiff's sixth instruction, which informed the jury that the assent of parties to an agreement need not be expressed, but may be implied from their language or from their conduct, or may be inferred from their silence in certain cases, and so, if the jury believe that Campion allowed Gray, the agent of plaintiff, to take charge of the goods in controversy without objection and to pack the same into boxes, and voluntarily assisted said Gray in so packing said goods, then the jury may find that the said Campion did in fact assent to the delivery of said goods to plaintiff, it seems to us unexceptionable in its statement of the rule of law as applicable to the facts contained in its assumption.

VIII. The first instruction given for the defendants, which told the jury that the writ of attachment read in evidence and the seizure of the goods thereunder by defendant Bain was and is sufficient to entitle him to the possession thereof as against plaintiff, unless the jury believe from a preponderance of the evidence that plaintiff was the owner of the goods, and entitled

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to the possession thereof at the time of the seizure of the same under said writ, was erroneous. It makes the writ of attachment *alone* sufficient evidence to entitle the defendant sheriff to the possession of the goods as against the plaintiff, a stranger claiming title thereto. When an officer attaches property found in the possession of the defendant, he can always justify the levy by the production of the writ of attachment, if it be issued by a court or officer having lawful authority to issue it, and it be in legal form. But, where property is found in the possession of a stranger claiming title, the mere production of a writ will not justify the seizure under it. Even the production of the writ and proof of the debt is not sufficient. Something more is required to justify the taking of the property from the possession of third parties. If the officer seizes property of the debtor, and the writ be regular on its face, it is a sufficient justification to him; for the defendant may, if the attachment has been improvidently issued, move to have it quashed, but a third party, a stranger to the record, could not interfere, and, therefore, it would seem but justice that before any right could be established against him by reason of the proceeding to which he was not a party, that the regularity should be shown, *i. e.*, that all the precedent steps required by law to authorize the issue of the writ of attachment have been duly taken, or in other words the sheriff must show that the petition, affidavit and bond, as required by statute, were filed in a court of competent jurisdiction before the issue of the writ of attachment. The establishment of these conditions in addition to the production of the writ and proof of the indebtedness are essential to make out a *prima facie* case by the sheriff. This is necessary before he can question the title of the plaintiff in the replevin suit. The authorities all support the foregoing statement of the law. Colby on Replevin, secs. 1007, 1009; Drake on Attachment, sec. 185; Wells on Replevin, secs. 302, 303; *Thornburg v.*

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Hund, 7 Cal. 554; *Williams v. Elkenbury*, 25 Neb. 721; *Oberfelder v. Kavanaugh*, 21 Neb. 483; *Jaines v. Van Duyre*, 45 Wis. 512. The court, therefore, erred in telling the jury, as it did in this instruction, that the production of the writ of attachment and the levy thereunder was sufficient to entitle the sheriff to the possession of the goods, unless plaintiff showed by preponderance of evidence that he was the owner of the goods at the time of the seizure. The establishment of the facts assumed in this instruction would not entitle the sheriff to the possession of the goods as against plaintiff who had the possession under a claim of right at the time of the seizure. A further showing was necessary, as we have seen, to entitle the sheriff to question the plaintiff's *prima facie* right to the possession of the goods.

IX. The defendant's fourth instruction, of which complaint is made, told the jury, in effect, that to constitute a valid sale and delivery of the goods as against the sheriff, Campion must have consented to reconvey the goods with intention to divest himself and reinvest the title in the plaintiff and must have intended to part with the goods and have *actually parted with the possession*, and with the intent to divest himself of the title, and the defendant must have accepted the same with the intention to make them its own. At the common law, the only things essential to a valid sale of personal property were a proper subject, a price, and the consent of the contracting parties, and when these concurred the sale was complete and the title passed without anything more. 2 Black, Com. 447; *Bloxon v. Sanders*, 4 Barn. & Cress. 941. The exception to this rule is where the subject of the sale is part of a larger mass from which it must be separated by counting, weighing or measuring, or as goods to be hereafter procured and supplied to the buyer or to be manufactured for his use. Hence in a transaction in relation to a part of a mass a sale could not take effect as a present sale immediately

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changing the property, until the separation is actually made. *Cunningham v. Ashbrook*, 20 Mo. 554; *Glasgow v. Nicholson*, 25 Mo. 29; *Bars v. Walsh*, 39 Mo. 192; *Ober v. Carson*, 62 Mo. 209.

Although at common law, consent alone was sufficient to constitute a valid sale, the statute of frauds has now intervened, which must be observed. The statute begins where the common law stopped, and requires that the transaction, before considered complete so as to effect a change in ownership, "shall be accompanied by a delivery in a reasonable time, regard being had to the situation of the property and be followed by an actual and continued change of the possession of the things sold." R. S., sec. 5178. This instruction goes further than the statute of frauds. It denies to the vendor and the vendee the right to deliver the subject of the sale within a reasonable time after the transaction. As a definition of a valid sale and delivery it is too narrow and restricted. Under the statute the title may pass if the sale is accompanied by a delivery in a reasonable time. The sale and delivery need not be contemporaneous, although a sale in good faith may not have been accompanied with a delivery; it is valid until the expiration of a reasonable time for such delivery. It becomes fraudulent and void as to creditors and subsequent *bona fide* purchasers only after the lapse of a reasonable time for the delivery. The instruction is, in view of the evidence in respect to the nature and situation of the goods and the transaction between Campion and plaintiff, improper and misleading, and should not have been given.

X. The defendant's fifth instruction should have, as it did not, directed the jury, that if they found for the defendant, to assess the value of the goods *at the time of the trial.* The only evidence offered as to the value of the goods was what it was at the time of the caption. The evidence was received and the instruction given upon erroneous notion of the time at

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which the value of the goods was to be found. *Hinchy v. Koch*, 42 Mo. App. 230; *Chapman v. Kerr*, 80 Mo. 158; *Richey v. Burnes*, 83 Mo. 362; *White v. Storms*, 21 Mo. App. 288; *Hoester v. Teppe*, 27 Mo. App. 207.

It results from what has been said that the judgment of the circuit court will be reversed and the cause remanded. All concur.

J. S. HALL *et al.*, Respondents, v. W. H. DEARMOND *et al.*, Appellants.

Kansas City Court of Appeals, November 9, 1891.

Cities, Towns and Villages: COUNTY COURT: APPEAL. **No appeal lies from the action of the county court incorporating a town under section 977, Revised Statutes, 1889.**

Appeal from the Platte Circuit Court.—HON. JAMES M. SANDUSKY, Judge.

AFFIRMED.

Roney & Chinn and *N. B. Anderson*, for appellants.

(1) The circuit court had jurisdiction on appeal to try this case. R. S. 1889, secs. 3434, 3318. There is no express prohibition of appeal by law in cases of this kind. (2) The judgment of the county court incorporating the city of Edgerton was not a legislative but a judicial act. 1 Dillon, Mun. Corp. [4 Ed. 1890] 265, foot note 3, page 72, foot note (Missouri); *Kayser v. Trustees of Bremen*, 16 Mo. 91; *State ex rel. v. Wilcox*, 45 Mo. 463; *Lammont v. Lidwell*, 62 Mo. 191; Const.

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Mo. 1875, art. 3 ; Const. Mo. 1875, secs. 29, 30, art. 2; R. S. 1889, sec. 1993; *Overbeck v. Galloway*, 10 Mo. 364; *Bernard v. Callaway*, 28 Mo. 37.

Connelly Harrington and *Jas. W. Coburn*, for respondents.

(1) The circuit court has no jurisdiction on appeal to try this case. R. S. 1891, sec. 3318; R. S. 1879, sec. 1102; R. S. 1891, secs. 3434; R. S. 1879, sec. 1210; *Aldridge v. Spears*, 40 Mo. App. 530; *Railroad v. City of St. Louis*, 92 Mo. 165; *Sheridan v. Fleming*, 93 Mo. 325. (2) No appeal lies from an order of the county court ministerial in its character. *Railroad v. City of St. Louis*, 92 Mo. 165; *St. Louis v. Sparks*, 11 Mo. 202; *Tetherow v. County Court*, 9 Mo. 117; *Snoddy v. Pettis Co.*, 45 Mo. 362. (3) The act of incorporation of a town is not a judicial act, or in the nature of a judicial act, but is legislative or administrative. *Woods v. Henry*, 55 Mo. 562, 563.

Ellison, J.—This is a proceeding begun in the county court of Platte county under section 977, Revised Statutes, 1889, to incorporate the town of Edgerton. The petition was granted, and an order entered incorporating the town as prayed. Certain parties interested in the lands included within the limits of the town remonstrated with the county court, and on the petition being allowed they appealed to the circuit court of Platte county. The latter court dismissed the appeal for want of jurisdiction, and the sole question here is, is there an appeal from the order of the county court incorporating a town under the section aforesaid? We think there is no appeal from the county court in such case. The act of the county court in such a case is not a judgment or order in the sense of the statute allowing appeals. Authorities on a kindred question are examined at length in *Aldridge v. Spears*,

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40 Mo. App. 527; s. c., 101 Mo. 400. The matter presented by a petition for incorporation is not judicial. It is more, in its nature, administrative or ministerial. When a petition containing the requisite number of petitioners is duly presented, the incorporation is granted as of course. There seems to be no discretion in the county court.

Arguments have been advanced against the constitutionality of laws permitting courts to incorporate towns based on the idea that it was a delegation of political power. It was in answer to such an argument that the supreme court in case of *Kayser v. Trustees*, 16 Mo. 91, stated that the powers granted to the county court were not political but judicial. That court, however, also stated that the county court had no discretion in the matter. The court doubtless did not mean to say that the powers were judicial in the ordinary sense, but judicial rather than political. So in case of *Wood v. Henry*, 55 Mo. 560, such action of the county court is held not to be judicial, but administrative or ministerial.

The judgment of the circuit court is affirmed. All concur.

JAMES CARR, Appellant, v. A. C. DAWES, Respondent.*

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Kansas City Court of Appeals, October Term, 1891.

ON MOTION FOR REHEARING.

Per Smith, P. J.:

1. **Appellate Practice**: PROVINCE OF APPELLATE COURT: DISCRETION OF TRIAL COURT. In this state it is incontrovertibly established by decisions of all the appellate courts, that they are empowered, by virtue of their superintending control over inferior courts,

* For the original opinion in this case see page 351, *ante*.

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on appeal or writ of error, to review and interfere with the discretion of such inferior courts in setting aside their findings, verdicts and judgments, in those cases where it is affirmatively shown that their action was illegal, because in contravention of some statute, or when oppressively or abusively exercised, or when their discretion has been unjudicially exercised.

Per Ellison, J.:

2. **——— : ——— : ———. There are two kinds of discretion reposed in the trial courts of general jurisdiction, one is limited by rules or principles of law; the other is absolute and exists where no fixed or certain rule of law can apply. The former is reviewable, the latter is not, and from the nature of the case cannot be.**

3. **——— : ——— : SETTING ASIDE JUDGMENT BY DEFAULT: COMMON LAW: STATUTE. By common law the granting a new trial or setting aside a judgment by default rested in the absolute discretion of the trial court and was not reviewable, and, while the common law as to new trials has been superseded by statute, yet no statute seems to have touched the power and discretion over judgments by default.**

4. **——— : ——— : SETTING ASIDE V. REFUSING TO SET ASIDE A JUDGMENT. There is a distinction between setting aside a judgment and refusing to set it aside. In the former case, the plaintiff is without remedy, in the latter, error will lie in behalf of the defendant.**

MOTION OVERRULED.

SMITH, P. J.—The defendant on the hearing of the case contented himself by submitting quite a meager brief, but, in support of his motion for a rehearing, he has filed a very able and elaborate one. In view of this, I have made a second reconnoissance—re-examination—of the whole ground covered by his argument, and the result has been to rivet the convictions on my mind which had been previously formed and expressed in the opinion.

Without entering into an examination and consideration in detail of the authorities, it is sufficient to say that, whatever may have been decided elsewhere, in this state it is incontrovertibly established by the decisions

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of all the appellate courts, that they are empowered, by virtue of their superintending control over the inferior courts, on appeal or writ of error, to review and interfere with the discretion of such inferior courts in setting aside their findings, verdicts and judgments, in those cases where it is affirmatively shown that their action was illegal, because in contravention of some statute, or when oppressively or abusively exercised, or when their discretion has been unjudicially exercised. *State ex rel. v. Burrows*, 66 Mo. 227; *Gillstrap v. Felts*, 50 Mo. 428; *Laurent v. Millikin*, 10 Mo. 496; *O'Fallon v. Davis*, 38 Mo. 269; *Griffin v. Veil*, 56 Mo. 310; *Fretwell v. Leffron*, 77 Mo. 26; *Nelson v. Ghiselin*, 17 Mo. App. 663; *Fannon v. Plummer*, 30 Mo. App. 28; *Hanel v. Freund*, 17 Mo. App. 618; *Blanchard v. Wolf*, 6 Mo. App. 200; *Wight v. Railroad*, 20 Mo. App. 481; *Smith v. Wheeler*, 27 Mo. App. 16; *Bullock v. Cook*, 28 Mo. App. 610; *Tucker v. Ins. Co.*, 63 Mo. 588. While the cases in this state are quite uniform, to the effect "that until the end of the term its judgments are in the breast of the court and may be modified, vacated or set aside as justice demands, becoming absolute only upon the adjournment of the court for that term" (*Rottmann v. Schmucker*, 94 Mo. 139; *Randolph v. Sloan*, 58 Mo. 155), but nowhere has it been expressly held that the discretion of the court, in modifying, vacating and setting aside its judgments, is not the subject of review by the appellate courts, on appeal or writ of error, upon the grounds already stated.

The power of the appellate courts to review the discretionary action of the inferior courts in matters of this kind, I think, is a part of their general and inherent power, which they are at liberty to exercise, subject to the limitations already referred to.

I think the motion should be overruled.

ELLISON, J.—I have not thought the authorities cited in the foregoing opinion bear upon the question which is here put to us.

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I am not prepared to say that I fully understand the rule in this state as to the revisory power of an appellate court over the discretion of a circuit court in setting aside a judgment by default during the term at which it was rendered. In *Laurent v. Milliken*, 10 Mo. 495, Judge McBride seems to assert that if a very strong case of abuse of discretion was made out, or an egregious error was shown, that the appellate court would interfere. But in *Rottmann v. Schmucker*, 94 Mo. 139, the court declares the power over such judgments is "*unlimited*," citing Freeman on Judgments, section 90, where the same expression is used, and where it is further stated, that there is *no remedy* for a plaintiff in case his judgment be set aside. Though if the court should *refuse* to set such judgment aside error will lie in behalf of the defendant. The distinction is obvious and was pointed out by Scott, J., in *Laurent v. Milliken, supra.* There may be said to be two kinds of discretion reposed in the trial courts of general jurisdiction, one is limited by rules or principles of law; the other is absolute and exists where no fixed or certain rule of law can apply. The former is reviewable by an appellate tribunal; the latter is not, and, from the nature of the case, cannot be.

There is no question as to how the matter stands at common law. By the common law the granting a new trial or setting aside a judgment by default rested in the absolute discretion of the trial court, and was not reviewable. *Harrison v. Clark*, 1 Scam. 131; *Garner v. Crenshaw*, 1 Scam. 143; *Gillett v. Stone*, 1 Scam. 539; *Sweeney v. Jarvis*, 6 Texas, 36; *Marine Ins. Co. v. Hogston*, 6 Cranch, 206; *White v. Church*, 5 Conn. 187.

The common law as to new trials has been superseded by statute, but no statute seems to have touched the power and discretion over judgments by default. Looking at the matter then as uncontrolled by the statute we find: "The law in respect to certain matters confides in the judge a discretion, which, from the

nature of the case, cannot be revised, and is subject to no other limit or control than his own moral sense of justice. Such is the power of granting continuances. If a continuance be improperly granted it cannot be corrected by a revising tribunal. Yet the injury may be as great as that of improperly granting a new trial." *Sweeney v. Jarvis*, 6 Texas, 40. Objection was made to the vacation of a decree in *Goddard v. Ordway*, 101 U. S. 751, and the court said of the motion to vacate that, "It was addressed entirely to the discretion of the court and depended on facts within the knowledge of the justices." *Cheany-Kee v. United States*, 3 Wallace, 320; *People v. Superior Court*, 5 Wend. 114. In the limited examination which I have found time to give the matter I have not found a case where the common-law rule has been questioned in the absence of a statute. There are cases where some confusing statements are made as to the revisory power of an appellate court, but all such seem to have been made in a way which suggests that the writer, without examination, assumed that he was asserting a correct proposition. In none of them is it apparent that there was any *intention* to controvert the common-law rule.

As before stated the distinction between setting aside a judgment by default and refusing to set it aside is apparent. If the judgment be set aside no harm results, as the law assumes that justice will yet be done between the parties, whereas, if the motion to set it aside is refused, the case is closed, and the party suffering should be allowed to complain in an appellate tribunal. There are instances, without number, where an appellate court has reviewed the discretion of the trial court in *refusing* a continuance, but I can recall no instance in which such appellate power was exercised where the continuance had been granted. There are some matters which transpire in a cause while before the trial court that from the very nature of the situation must necessarily be left wholly within the discretion of that court.

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CASPER GESTRING, Respondent, v. SYLVESTER J. FISHER *et al.*, Appellants.

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St. Louis Court of Appeals, November 10, 1891.

1. **Principal and Agent:** LIABILITY OF AGENT ACTING WITHOUT AUTHORITY. An agent who undertakes to bind his principal, when in fact he has no power to do so, is responsible to the other contracting party for the damages occasioned by the non-performance of the contract; and this is so whether he acts in good faith or not.

2. ——: ——: AGENCY FOR THE SALE OF REALTY. This rule applies to an agent for the sale of realty who has no authority in writing to sell the realty, and whose principal refuses to execute a contract of sale made by him. But, in the absence of an express agreement to the contrary, such agent merely undertakes to bind the interest of his principal in the realty, without warranty of title.

3. ——: ——: ——: MEASURE OF DAMAGES. The mere fact that such agent has undertaken to sell realty in the name of his principal, without legal authority to bind such principal, does not render him responsible for any defect in the title of the principal. In the absence of evidence of other damages, the measure of the agent's liability to the purchaser in such case is the excess of the market value of the principal's title, whether good or bad, over the contract price.

4. **Principal and Agent:** ADMISSIBILITY OF DIRECTIONS FROM THE PRINCIPAL TO THE AGENT AS EVIDENCE OF THE LATTER'S AUTHORITY. In an action wherein a principal is sought to be held upon a contract made for him by an agent, his instructions to the agent are always admissible as evidence of the extent of the agent's actual authority, if the extent of that authority is an issue in the case; and, therefore, a disputed claim of estoppel will not render such evidence inadmissible.

Appeal from the St. Louis City Circuit Court.—HON. JACOB KLEIN, Judge.

REVERSED AND REMANDED.

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Lee & Ellis and *Montague Lyon*, for appellants.

(1) An agent is required by general law to have authority in writing in order to bind his principal to a contract for the sale of the principal's lands, and, therefore, it is the duty of persons dealing with the agent to ascertain whether or not such authority exists, in the absence of any fraudulent representation by the agent that such written instrument exists, and that the requisite authority is conferred by it. R. S. 1889, sec. 5186; Mechem on Agency, sec. 273, p. 176; sec. 289, p. 190; sec. 291, p. 191, and cases cited. (2) The testimony of Mr. Fisher, one of the appellants, concerning his instructions to Mr. Meany, their salesman, as to the restrictions placed upon them in the sale of the property in question, should have been admitted, and the court below erred in excluding it. *Baker v. Railroad*, 91 Mo. 152; *Brownfield v. Ins. Co.*, 26 Mo. App. 390. (3) The court below should have given to the jury the instruction asked by the appellants on the question of their ignorance of the signing of the receipt by Mr. Meany, and their subsequent repudiation of said receipt read in evidence by the respondent. *Richardson v. Palmer*, 36 Mo. App. 88; *Lingenfelter v. Ins. Co.*, 19 Mo. App. 252; Wood's Law of Master & Servant, sec. 273. (4) The respondent was not entitled to recover more than the $25 which he deposited as earnest money with Mr. Meany, and which the appellants tendered back to the respondent immediately upon their repudiation of the receipt read in evidence. There was no representation by Mr. Meany or the appellants, or either of them, that they had the requisite authority to make the sale, or that J. C. Birge was the owner of the property, and the respondent made no inquiry of Mr. Meany, or the appellants, as to who the owner of the property was. The whole transaction was based upon a mutual mistake made by Mr. Meany and Mr. John Gestring, acting for his father, the respondent. The

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appellants did not, therefore, bind themselves personally in this transaction. According to the receipt, if the title was not perfect there was to be no sale. *Michael v. Jones*, 84 Mo. 578; *Richardson v. Palmer*, 36 Mo. App. 88; *McCurdy v. Rogers*, 21 Wis. 197; *Ogden v. Raymond*, 22 Conn. 379; Story on Agency [9 Ed.] sec. 265, p. 317.

Rassieur & Schnurmacher, for respondent.

(1) Where one undertakes to enter into a contract for another, as his agent, and has no authority for so doing, he will become personally bound for the performance of the contract. Story on Agency, sec. 264; Am. & Eng. Ency. Law, "Agency," p. 401; *Wright v. Baldwin*, 51 Mo. 269. (2) Defendants had no authority to enter into the contract here in question. Under the statute such authority would necessarily have had to be in writing, and they had no writing. R. S. 1889, sec. 5186. Independent of the statute, the evidence shows that they had no authority to sell the property in question, except in connection with other property. (3) The law which requires that an agent's authority to sell lands must be in writing is intended for the protection of the owner, and cannot be invoked by an agent who has acted without such authority. *Gerhart v. Peck*, 42 Mo. App. 644. Plaintiff had a right to assume as against defendants, but not as against the owner, that defendants were acting with authority. (4) The private instructions of a principal to his agent or clerk, clothed with apparent general authority, are inadmissible against strangers dealing with such agent. The secret directions of defendants to their real-estate salesman, Meany, whose duty, as shown by defendant's own evidence, was to do precisely what he did in this case, were properly excluded. *Jackson v. Ins. Co.*, 27 Mo. App. 62; *Brownfield v. Ins. Co.*, 26 Mo. App. 390; *Kinealy v. Burd*, 9 Mo. App. 359. (5) The measure

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of damages was properly laid down in the instruction given for plaintiff. Defendants, having no authority to act for the owner, became bound personally for the sale of this land to plaintiff, and became responsible for the payment of the same damages as if they, owning the land, had agreed to convey the same. They put it out of their power to comply with their legal obligation by managing a sale the very next day to one Campbell. What the damages in such a case are has been fully settled by the case of *Hartzell v. Crumb*, 90 Mo. 629, affirming the case of *Kilpatrick v. Downing*, 58 Mo. 32.

ROMBAUER, P. J.—The plaintiff's petition seeks to recover from the defendants $2,700, the alleged difference between the real value of certain real estate, and the price at which the defendants sold it to him. The cause of action is, that defendants, as agents of one J. C. Birge, undertook to sell said real estate to plaintiff, claiming authority to sell it for him at a stated price, while in fact they had no such authority from anyone; and it rests on the familiar principle that, where one undertakes to enter into a contract as agent for another, and has no authority for so doing, he will be personally bound for the damages resulting from the non-performance of the contract. Upon the trial of the cause before a jury, the plaintiff recovered a verdict for $425, which was fully warranted by the evidence as to amount, if the view of the law taken by the court was correct. The defendants, appealing, assign for error that the evidence adduced warranted no recovery beyond $25; that the court excluded legal evidence offered by the defendants, and that it misdirected the jury as to the law.

The plaintiff gave evidence tending to show the following mentioned facts: The defendants were real-estate agents in the city of St. Louis, and, as such, published a monthly real-estate price current, stating that no property was advertised therein, unless the exclusive agency for its sale was given to them. Among

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the items advertised in this price current was the following: "Hempstead street, north side, one hundred feet east of Broadway, thirty-eight by one hundred and twenty-five, block 250 north, price $30 (per foot)." The plaintiff saw this item, and sent his son to the defendants' office to buy the property. The son met there one Meany, who was one of the sale clerks of the defendants, and he paid $25 earnest money for the purchase of this lot to Meany, who thereupon executed and delivered to him the following memorandum:

"Office of Fisher & Co.,
S. J. Fisher, Cleves S. Fisher,
Real Estate, No. 714, Chestnut St.

"St. Louis, April 29, 1890.

"Received of C. Gestring $25, as earnest money and in part payment of the purchase of lot on Hempstead street, north side, one hundred feet east of Broadway, being lot thirty-eight by one hundred and twenty-five in city block 250 north, of St. Louis, Missouri, sold to C. Gestring for the sum of $1,140, or $30 per foot, terms of sale as follows: Cash. Title to be perfect, or no sale. If the title is not perfect, earnest money to be refunded and examiner's fees paid by us. Taxes of 1890 to be paid by purchaser.

"[Signed] J. C. Birge,
"Fisher & Co.
"Agents."

"I agree to the above.
"[Signed] C. Gestring."

The plaintiff also gave evidence that Meany, the clerk, before delivering the receipt, told one of the defendants that he had sold this property to the plaintiff, and that said defendant thereupon remarked that he was glad that the plaintiff got it, because, on the first of the month, the owner was going to put it up $10. There was no evidence that either of the defendants saw this receipt before it was delivered to the plaintiff's son, nor was there any evidence that plaintiff's son inquired

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any further into the authority of the defendants to sell this property at $30 per front foot, except as hereinabove stated. It was conceded by the evidence that the plaintiff was ready to consummate the purchase by payment of the residue of the purchase money, and that a formal tender was waived.

The following additional fact bearing upon the case also appeared in plaintiff's evidence, namely, that J. C. Birge had no title to the property when the memorandum of sale was made, but that the title thereto was in Mary C. Birge, his wife, and that the defendants, more than ten days after the execution of the memorandum, and when threatened with litigation, wrote a letter to plaintiff containing the following statements:

"As we wrote your attorney, Mr. Rassieur, we regret that we are unable to carry out the agreement which was made with you to sell you lot on Hempstead street. This is the first time, since we located in business in this city, that such a thing has happened; but, as you were informed of this fact on the day subsequent to this transaction, we cannot see how it is possible that you can be damaged, either directly or indirectly, and, as you must surely know that it was not our purpose to treat you in this way, we cannot see what will be gained by litigation." * * *

The plaintiff also gave evidence that the market value of the lot in question was at least $400 in excess of the price stated in the memorandum.

The defendants gave evidence showing that they had no written authority, either from J. C. Birge or his wife, the true owner, but had oral authority to sell this lot for $30 per front foot, provided this and another higher priced lot were sold together, and not otherwise. Meany, the defendant's sale clerk, testified that, prior to the execution and delivery of the memorandum, he stated this fact to the plaintiff's son, to whom the receipt was delivered, adding that, as the firm had no

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authority to sell this lot separately, the sale was subject to the owner's approval, but that he would use his best efforts to obtain such approval. He also testified that the memorandum of sale was copied in the letter press copy book of the defendants' before it was delivered. The senior member of the defendant's firm, being examined on the defendants' behalf, was asked successively the following questions: "What instructions, if any, did you give Mr. Meany in regard to the sale of this piece of property in controversy, the Hempstead property?" "Has Mr. Meany ever made a sale of property for Fisher & Co., without instructions from you or your son, a member of the firm?" These questions were excluded by the court upon the plaintiff's objection, and the defendants excepted and still except. The witness, however, did testify, in answer to other questions, that Meany was employed by him, together with others, to make sales; that he gave them all the same instructions; that everybody entering the office to buy property was met by his agents or salesmen at the door, and the salesmen tried to make sales to such person; that, if they succeeded in agreeing upon the price and terms, the agent or sub-agent, or clerk in the witness' office, stepped back and saw whether there was any authority in writing in the office to sell the property, and, if there was no such authority in writing, conditional sales were made, to be approved by the owner afterwards, but that, if the authority was found to be there, an unconditional sale was made without being subject to any approval whatever; that, where the authority was not in writing, the same was made subject to the owner's approval in all cases, unless the witness himself otherwise ordered.

The defendants asked the court to instruct the jury as follows: "The court instructs the jury that, under the pleadings and the evidence in this case, the plaintiff is not entitled to recover beyond the sum of $25."

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"The court instructs the jury that, if they believe from the evidence that the defendants were ignorant of the fact, that one Joseph P. Meany had signed the name of J. C. Birge, Fisher & Co., agents, to the receipt read in evidence, and dated April 29, 1890, at the time said receipt was so signed and delivered by the said Meany to John Gestring, and that the defendants, as soon as they learned the contents of the said receipt, refused to recognize said receipt; and, within a reasonable time thereafter, notified plaintiff of that fact, then, there was no ratification of said receipt by the defendants, and the jury should find their verdict for the defendants."

The court refused so to instruct, but instructed the jury as follows: "The court instructs the jury that, if they find from the evidence that witness Meany was in the employ of the defendants as a salesman of real estate on April 29, 1890, and that a part of his duty, as such salesman, was to receive earnest money on sales, and to execute and deliver contracts in writing of such sales, in the name of the firm of defendants; and, if the jury further find that, on said day, said Meany did execute, sign and deliver the receipt read in evidence, and that at said time defendants had no written authority from the owner of the real estate therein described to sell the same, and that defendants, within a reasonable time after said date, failed and refused to procure and deliver to plaintiff a deed for said real estate, and that plaintiff, or his agent, offered to comply with the terms of said sale, and demanded a deed, then the jury will find a verdict for the plaintiff, unless you believe and find from the evidence that at, or prior to, the time when said receipt of April 29, 1890, read in evidence, was delivered by said Meany to said John Gestring, he, the said Gestring, knew or was informed that said Meany had no authority to make or execute the said receipt, or knew or was informed that said Fisher & Co. had no written authority to make a sale of said

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property, or knew or was informed that said sale, evidenced by said receipt, was made subject to the approval of the owner of the property, or unless you believe from the evidence that said receipt was received by said John Gestring with the understanding at the time that Meany, or Fisher & Co., would endeavor to obtain the approval of the owner to such sale, and that they were not able to do so, after reasonable efforts, as explained in the instructions given you, and marked numbers 4, 5, 6 and 7."

"Unless you find and believe from the evidence that the instructions spoken of by the witnesses, Fisher and Meany, in regard to the sale of the property mentioned in the writing, dated April 29, 1890, read in evidence, were known or communicated to John Gestring at or before the delivery of said writing by Meany to said Gestring, they cannot affect the rights of the plaintiff in this case, and, in that event, the testimony in relation thereto should be wholly disregarded by you in arriving at a verdict in this case."

"If the jury find for the plaintiff, they will assess his damages at such sum, if any, as the jury may find from the evidence the reasonable market value of the premises described in the petition, in the first week of May, 1890, was greater than the price fixed by the memorandum of sale, together with the amount paid by plaintiff as earnest money to the defendants."

We have set out the record thus fully, because it raises some propositions which are seemingly novel. That an agent who undertakes to bind a principal, when, in fact, he has no power to do so, thereby renders himself individually responsible, is an elementary proposition, and it makes no difference whether in so doing the agent acts in good faith or otherwise. In *Smout v. Ilbury*, 10 M. & W. 1, it is stated that one of the cases rendering an agent thus responsible is, where, not having in fact authority to make the contract as agent, he yet does so under the belief in good faith that such

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authority is vested in him, and that view is approved in *Wright v. Baldwin*, 51 Mo. 269. But a contract of a real-estate agent in selling property intrusted to him for that purpose is peculiar. In absence of an express agreement to the contrary, he does not undertake to bind all claimants of the title, nor that he will sell an unincumbered fee-simple title, but only that he will sell such title as his principal has. Whether the sale is finally consummated depends, generally, upon the further question whether his principal has a perfect title, or, if not, whether the vendee is satisfied with an imperfect title. The agent, by his agreement to negotiate a sale, assumes no obligation in reference to the title, unless it was made a part of his duty to have the title examined before attempting to affect a sale (*Gerhart v. Peck*, 42 Mo. App. 651), or unless he warrants the title to the vendee.

Now, in the case at bar, the petition charges, that the defendants pretended to have authority *from one J. C. Birge*, under which they agreed in his name to sell to plaintiff a lot of land *belonging to said Birge;* that they had no such authority; that the plaintiff tendered to Birge the purchase money, and demanded of him a conveyance of the lot, which Birge refused to make, etc. The proof offered is in support of the pleadings. The plaintiff claims under the memorandum, which he asserts must be taken as evidence of the sale which the defendants agreed to make to him of the title of J. C. Birge. The memorandum purports to bind J. C. Birge as principal, and no one else. The statement, "title to be perfect or no sale," relates to the title bargained for. That condition, it is true, is inserted for the benefit of the vendee, and he may waive it, and the vendee claims that he has waived it by insisting on a deed from J. C. Birge, so that giving his evidence the greatest effect, we are ready to concede that he has shown a cause of action. But a different question arises when it comes to the measure of his damages.

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The theory of damages is compensation, and the plaintiff's own evidence shows, that, if he had got all he unconditionally bargained for, namely, J. C. Birge's title to the lot, he would have got less in value than what he agreed to pay for it, because that evidence shows that the title to the lot was in Mary C. Birge, and not in J. C. Birge, and a husband has no more power to convey his wife's title to lands than a stranger. The uncontradicted evidence shows that the $25, which plaintiff had deposited as earnest money with the defendants, was tendered to him at once upon a failure of the sale, although the tender was not kept up by deposit in court. As the plaintiff has shown no other substantial damages, which he could recover on any compensatory theory, we must conclude that the court erred in not instructing the jury, as requested by the defendants, that the recovery was limited to that sum, and also erred by giving the instruction on the measure of damages, requested by the plaintiff.

In view of the recurrence of other questions which arise upon this record, we deem it proper to make the following additional observations. The plaintiff was justified in assuming from the prospectus published by the defendants, and from their acts in trying to sell this lot to him, that they had legal authority from some one to sell it. If this were a question between the plaintiff and the owner, the law would be different. We also add, what we had recent occasion to say in another case, that instructions from the principal to the agent are always admissible in evidence, and hence there was no valid objection to the admission of the oral instructions given by Fisher to Meany, although the ruling out of that evidence in view of the subsequent testimony of Fisher which was admitted, could hardly be deemed to be prejudicial error. Where the agent receives instructions, they always form the limit of his authority between himself and his principal. Where the agent is held out to the world as possessing greater authority,

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the principal is estopped from relying on undisclosed instructions, as against persons who relied on the agent's apparent authority, but, as such holding out is a question of fact for the jury, we cannot see on what principle the court can rule out instructions from the principal to the agent, simply because the jury are justified in finding that such instructions are opposed to the apparent authority of the agent.

All the judges concurring, the judgment is reversed, and the cause remanded.

THE LINDELL GLASS COMPANY, Plaintiff in Error, v. LINA HANNEMAN *et al.*, Defendants in Error.

St. Louis Court of Appeals, November 10, 1891.

1. **Appellate Jurisdiction:** TITLE TO REAL ESTATE. **A suit for the admeasurement of dower involves title to land, and this court has, therefore, no appellate jurisdiction thereof.**

2. **——— :** PRACTICE. **If a writ of error is sued out in a cause whereof the supreme court has the exclusive appellate jurisdiction, this court cannot of its own motion dismiss the writ on the ground that the requisite statutory notice of the issue of the writ has not been given to the defendant in error; but the plaintiff in error may voluntarily dismiss the writ in this court.**

Error to the St. Louis City Circuit Court.—HON. DANIEL DILLON, Judge.

TRANSFERRED TO SUPREME COURT (*nisi*).

Thomas A. Russell, for plaintiff in error.

Lubke & Muench, for defendants in error.

ROMBAUER, P. J.—This is an action, wherein the plaintiff seeks to subject the dower interest of one of

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the defendants in certain lands to several executions obtained against her, and, for the purpose of so doing, wants to have her dower therein admeasured. The other defendant claims to be the owner in fee of the premises discharged of the widow's dower, and filed an answer setting up facts which he claims show that result. His answer was demurred to by the plaintiff. The demurrer being overruled, the plaintiff elected to stand upon it, and there was judgment accordingly; whereupon the plaintiff sued out a writ of error returnable to this court.

The defendants' counsel, appearing for that purpose only, suggests that this court has no jurisdiction of the writ, because the case involves title to real estate, but at the same time suggests that the writ should be dismissed, and the record should not be transferred to the supreme court, because the plaintiff failed to give him twenty days' written notice, that the writ had been sued out, prior to the term to which the writ was returnable.

We have decided in the case of *Null v. Howell*, 40 Mo. App. 330, that a suit for admeasurement of dower involves title to real estate within the constitutional limitation of the jurisdiction of this court. Following that ruling, we are bound to transfer this cause to the supreme court. Neither can we, as the defendants' counsel suggests we should, dismiss the writ for want of sufficient notice, since it would be an incongruous proceeding to entertain jurisdiction of the writ for one purpose, and not for another. Nor is there any evidence before us that the writ should be dismissed, since the statute does not require that the notice in question should appear of record. Nor is the statute peremptory, since the party suing out the writ may, in the proper court, show good cause for his failure to give notice.

On the other hand the plaintiff may be aware that he has neither given the required notice, nor has good

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cause for his failure to do so, and may, therefore, elect to dismiss the writ here, and sue out another from the supreme court. We shall, therefore, order that this cause be transferred to the supreme court, unless the plaintiff within ten days will voluntarily dismiss the writ.

All the judges concurring, it is so ordered.

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THE STATE to use of CHAS. M. NAPTON, Assignee, Respondent, v. MARY C. HUNT *et al.*, Appellants.

St. Louis Court of Appeals, November 10, 1891.

1. **Voluntary Assignments for the Benefit of Creditors:** SUMMARY REMOVAL OF ASSIGNEE. An assignee under a voluntary assignment for the benefit of creditors may be summarily removed, not only for any of the causes prescribed by the chapter of the Revised Statutes of 1889 concerning such assignments, but also for any cause for which a trustee may be summarily removed under section 3929 of those statutes, which provides for the summary removal of trustees.

2. **Summary Removal of Assignee or Trustee:** CITATION OF TRUSTEE. *Semble* that, where a trustee has removed out of the state, he may be removed under said section 3929, without citation or previous notice.

3. **Judgments:** PRESUMPTIONS. If such citation or notice were necessary, it would be presumed, in the absence of proof to the contrary, by reason of the presumption which prevails in favor of the validity of judgments of courts of record having general jurisdiction.

4. **Voluntary Assignments for the Benefit of Creditors:** COMPENSATION OF ASSIGNEE FOR LEGAL SERVICES. An assignee for the benefit of creditors is not entitled to compensation for legal services rendered by himself, the rule governing trustees in that regard being applicable to him.

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5. ———: PLEADING: PARTIES: WAIVER OF OBJECTIONS. **If, upon the removal of such assignee, suit for the assets for which he is accountable is brought by his successor upon his official bond, and the defendants desire to object to the action upon the ground that the creditors of the estate, and not the assignee, were the proper parties to sue, they must make the objection by demurrer, and will waive it by failing so to make it.**

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

Stark & McEntire, for appellants.

(1) The petition does not state a cause of action against Mary C. Hunt, as devisee of Charles L. Hunt, because on its face the cause of action, if any, arose in 1884, and Charles L. Hunt died in 1885, thus stating a claim that could have been presented for allowance against his estate in the probate court, and no reason is given for the failure of the plaintiff to so present it for allowance. R. S. 1879, secs. 185, 192; R. S. 1889, secs. 184, 191. Citations under point 5. (2) The court did not obtain jurisdiction of the assignee for the purpose of removal because he was not cited according to the statute or notified in any way of the proceeding looking to his removal. (3) The circuit court can only remove an assignee by summary proceeding in the matter of the assignment for the specific causes defined in the assignment law; for any other acts of misconduct justifying his removal the remedy is by bill in chancery attended by all the formalities of a suit in equity. (4) There was no evidence at the trial that either Charles L. Hunt or Theodore Hunt executed the bond of Davenport as assignee, and the bond was not offered in evidence. *Groll v. Tower*, 85 Mo. 249; *McConey v. Wallace*, 22 Mo. App. 377; R. S. 1879, sec. 3654; R. S. 1889, sec. 2187; *Julian v. Rogers*, 87 Mo. 229. (5) It was an error to render judgment in this case either against Mary

C. Hunt or against her realty, because no evidence was offered to show that the personal estate of Charles L. Hunt was insufficient to pay his debts, or to show whether administration of his estate was ever begun or final settlement thereof had. 2 Woerner on Administration, pp. 1264, 1267; 4 Kent's Com. [12 Ed.] 434, 421; *Selover v. Coe*, 63 N. Y. 438, 442; *McClean v. McBean*, 74 Ill. 134, 137; *Baker v. Bean*, 74 Mo. 17, 21; *Clark v. Winchell*, 53 Vt. 408, 415. (6) If the defendants are liable in any view of the case, which is denied, then the court committed error in refusing to allow Napton to testify as to the value of the services rendered by Davenport.

Campbell & Ryan, for respondent.

(1) Davenport having removed from Missouri and the trust remaining unadministered, the court being informed by affidavit and upon application of creditors had the right to remove Davenport and appoint Napton. *Hartzler v. Tootle*, 85 Mo. 23, 29, 30; *Hatcher v. Winters*, 71 Mo. 30, 35; *Pinnec v. Hart*, 30 Mo. 561, 569, 570; *State ex rel. v. Miller*, 37 Mo. App. 83, 96; *Murdock v. Dickson*, 36 Mo. App. 399, 409; *Kehoe v. Taylor*, 31 Mo. App. 588, 598; *Hardcastle v. Fisher*, 24 Mo. 70, 74; R. S. 1889, secs. 459, 8683; *Shockley v. Fisher*, 75 Mo. 498, 502. (2) The assignee, being a mere trustee and subject generally to the rules governing trustees and having permanently removed from the state, could be removed without notice. *In re Bignold's Settlement Trusts*, L. R. 7 Chan. App. 223; *In re Harrison's Trusts*, 22 L. J. (N. S.) Chan. 69; *In re Pey's Trusts*, 42 L. T. (N. S.) 247, 248. (3) The presumption is that the circuit court acted properly in removing Davenport. *Stahl v. Mitchell*, 41 Minn. 325.

ROMBAUER, P. J.—The plaintiff's petition states that Eugene Papin made a voluntary deed of assignment in June, 1879, to B. R. Davenport for the benefit of his

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creditors, and that, on the fourth day of said month, the said Davenport qualified under the statute governing general assignments for the benefit of creditors, then in force, and gave bond, executed by Theodore Hunt and Charles L. Hunt as his sureties. The petition sets out a copy of the said bond, and alleges that said Davenport did not in all things discharge his duties as such assignee, and did not faithfully discharge the trust confided to him, and alleges a breach of said bond in the following terms, to-wit: "That heretofore, to-wit, on the sixteenth day of April, 1884, said Davenport having neglected and failed to perform his duties as such assignee, and plaintiff, Charles M. Napton, at said time was by said court appointed assignee in the place and stead of said Davenport, and qualified as such, and is now acting in that capacity; that, at the time of his dismissal from said trust, said Davenport had in his charge as such assignee the sum of $2,700, for which he has failed and neglected to account to this plaintiff as assignee of said trust."

The petition also states additional facts tending to show the liability of one of the defendants as devisee of Charles L. Hunt, which facts it is unnecessary to recite, as no point arises upon them upon this appeal.

The answers of the defendant sureties contain a general denial, and then proceed to put in issue the jurisdiction of the circuit court to dismiss Davenport as assignee and appoint Napton in his stead. They aver that no notice was served on said Davenport of any proposed application for his dismissal, and that the court never made any order on said Davenport to turn over to said Napton the assets and moneys of said estate. They further aver that while, at the time of the appointment of the said Napton, the said Davenport had in his hands $1,165.46, yet he had theretofore rendered services to said assigned estate of the value of $1,200, and was, therefore, not indebted thereto.

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The case was dismissed as against Davenport, and the plaintiff filed replies denying the new matter set up in the answers.

The court upon hearing of the evidence found that the plaintiff was entitled to recover from the defendants the sum of $1,165.45, with interest from the date of the removal of their principal, subject to an offset of $350, to which the assignee was entitled for services as assignee up to the date of his discharge. The court thereupon entered judgment against the defendants for the penalty of the bond, with an award of execution for $871.55, the difference between the amount found due to the plaintiff and the defendant's offset. The defendants, appealing, assign for error that the petition states no cause of action, because it fails to allege that a proper proceeding for the removal of Davenport as assignee was instituted; that the statute touching voluntary assignments does not provide for a summary removal of an assignee because he has removed from the state, or because he has failed to pay dividends; that the court erred in holding that the proceedings to remove Davenport as assignee are valid, no notice or citation to him being shown; that the court erred in excluding legal evidence offered by the defendants, and that the verdict was excessive.

The Revised Statutes, 1879, which were in force when assignee Davenport was removed, provided, in sections 381, 382 and 387 of the chapter concerning assignments for the benefit of creditors, for a summary removal of the assignee upon citation, if he failed to file an inventory, or to give bond or to pay dividends. The same statutes provided, in sections 3929 and 3930 of the chapter concerning trusts and trustees, that, "if any trustee in any deed of trust to secure the payment of a debt or other liability, or to whom any property is, or has been, conveyed, for the benefit or use of any person * * * shall remove or has removed out of this

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state * * * or shall neglect or refuse to perform or execute his trust, any person interested in the debt or other liability secured by such deed of trust may present his or their affidavit, stating the facts of the case to the circuit court of the county in which the property conveyed by such deed of trust, or any part thereof, is situated;" and that, if the court shall be satisfied that the facts stated in the affidavit are true, it shall appoint another trustee in place of the original trustee with the same powers, etc.

The defendants contend that, under these laws, an assignee could only be summarily removed for the causes stated in sections 381, 382 and 387, *supra*, while the plaintiff maintains that those sections do not operate as a limitation of the powers of the circuit court, but that, since it is conceded that an assignee is a trustee, he may be summarily removed from his trust for any of the causes mentioned in section 3929. We conclude that the plaintiff's contention is correct. There is nothing in sections 381, 382 and 387, which would indicate that the legislature intended that assignees should be summarily removed only for the causes therein stated, nor is there anything in the nature of a trust of an assignee which would render his summary removal for causes, for which other trustees may be removed, inexpedient. There is no decision of any appellate court in this state covering the exact point. But intimations are found in many cases indicating that such is the view of these courts. *Pinneo v. Hart*, 30 Mo. 561, 569, 570; *Hatcher v. Winters*, 71 Mo. 30, 35; *Hartzler v. Tootle*, 85 Mo. 23, 29, 30; *Kehoe v. Taylor*, 31 Mo. App. 588, 598; *State ex rel. v. Field*, 37 Mo. App. 83, 96. The first assignment of error must, therefore, be ruled against the defendants.

It is not controverted that, at the date of the removal of Davenport as assignee, he had removed from the state; that fact appears in the evidence of both parties. Assuming, therefore, that the court had power

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to remove the assignee for that cause alone, the validity of his removal cannot be questioned on the ground that no good cause existed, but only on the ground that the assignee had no due notice of the intended application for his removal. It will be perceived by examining the provisions of sections 3929 and 3930, *supra*, that they do not provide for a trial of the facts upon notice and answer, as sections 3932 and 3933 of the same law provide, but simply for presentation of an affidavit, and an inquiry by the court into the truth of the facts alleged therein. But even if we concede, for the purposes of the argument, that an order of removal without notice to the trustee would be invalid. yet we are bound to presume, nothing to the contrary appearing in the record, that Davenport in this case had due notice, because there is a presumption in all this class of cases upholding the validity of the judgments of courts of record having general jurisdiction. *Stahl v. Mitchell*, 41 Minn. 331. On the other hand, there are cases which we do hold, and it seems to us with good reason, that a trustee who removes beyond the jurisdiction of the court may be removed without citation. In *In re Bignold's Settlement Trusts*, L. R. 7 Chan. App. 223, service on a trustee who had become non-resident was dispensed with; and in *In re Martin Pey's Trusts*, 42 L. T. (N. S.) 247, MALIN, V. C., said, that he would make the new appointment, even if the non-resident trustee opposed it; hence he would not require any service. Since notice in any case is only required to give the trustee an opportunity to oppose the removal on legal grounds, it is not well conceivable how the want of notice can affect the validity of his removal, when the cause of removal is imperative and the existence of the cause is confessed.

The exception to the exclusion of evidence arises in this manner. While the plaintiff was on the stand as a witness, the defendants offered to show by him the value of certain legal services rendered by Davenport, while

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assignee. In the course of that examination the plaintiff stated that several years ago he had examined into this matter, and had concluded at that time what the services were worth. The court did not permit the witness to state what he had concluded at that time, but did permit him, against the plaintiff's objection, to state what he then (at the date of the trial) considered the value of such services. For the most obvious reasons there was no error in this ruling, of which the defendants had any right to complain. It was decided in *Gamble v. Gibson*, 59 Mo. 585, 593, that, while an executor may employ the services of an agent or attorney, if necessary, and pay for them out of the estate, yet, if he himself undertakes to act for the estate in such a capacity, he can receive no compensation for his services. The decision was not placed upon any ground specially applicable to executors or administrators, but upon a principle applicable to trustees generally. Judge WAGNER, in the course of the opinion, says that the rule is so strict, that if the trustee has a partner, and employs such partner as attorney, no charge can be made by the firm. Many cases are cited in support of the rule. The court, therefore, in this case would have committed no error, had it rejected all the testimony in regard to the value of Davenport's services, as attorney, for himself, as assignee. The court, as above seen, did allow to the defendants as sureties credit for what it considered reasonable allowances to the assignee for managing the estate, which amount was deducted from the amount admitted to have been in the assignee's hands and unaccounted for. As the statute nowhere provides for the measure of these allowances, they are largely within the discretion of the court having control of the assigned estate. There is nothing in the record to show that the court abused its discretion in this instance. The assignments of error, that the court excluded legal evidence, and that the verdict is excessive, must, therefore, also be overruled.

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A point is made in the printed argument, that the plaintiff is not the proper party to sue on the bond, but that the suit should have been brought by the creditors of the estate. No such point is made in the assignment of errors, and we may briefly dispose of it by saying that, if such objection were tenable at all, it is one which affects the plaintiff's legal capacity to sue, and must be made by demurrer to the petition. R. S., sec. 2043. Not having been thus made, it is waived under the provisions of section 2047.

All the judges concurring, the judgment is affirmed.

RICHARD DEUTMANN, Respondent, v. ROBERT J. KILPATRICK, Appellant.

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St. Louis Court of Appeals, November 10, 1891.

1. **Law and Fact:** CONSTRUCTION OF WRITTEN CONTRACTS. If an ambiguity in a provision of a written contract cannot be solved by reference to other parts of the contract, and if the surrounding circumstances are the subjects of controversy, the construction of the provision is a question of fact for the jury under proper instructions from the court.

2. **Construction of Ambiguous Contracts:** CONSTRUCTION BY PARTIES. In such case the interpretation put by the parties themselves upon the contract is of great weight, if not controlling authority.

3. **Disputed Claim:** ACCEPTANCE OF TENDER OF PART. Where a claim is disputed and a debtor tenders a part of it to the creditor in full satisfaction of it, the creditor, if he accepts the tender, is bound by the terms thereof; the creditor cannot accept the tender and prescribe the terms of acceptance.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

REVERSED AND REMANDED.

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H. D. Wood, for appellant.

Rassieur & Schnurmacher, for respondent.

Rombauer, P. J.—The plaintiff contracted to erect a building for the defendant in conformity with certain plans and specifications for the sum of $3,400. He built the house, and was paid the amount specified. When he received the last installment he executed a receipt containing the following recital: "The above is in full for all claims against R. J. Kilpatrick, and against the building and property upon which said work was and is done, and all time, labor and materials, furnished therefor and thereon." The plaintiff thereafter instituted the present suit to recover $104.75 for extra work on said building, and, upon the trial such proceedings were had, that the plaintiff recovered a verdict and judgment for $78.50. The defendant prosecutes this appeal, and assigns for error that the court gave erroneous instructions to the jury, wherein it placed a wrong construction upon the contract, as well as upon the legal effect of the receipt, the latter of which was claimed by the defendant as a release.

The extra work was claimed by plaintiff for work and material on twenty pairs of outside blinds, and for providing shelves in a pantry. Touching the last item, which amounts to $3.50, there is no controversy beyond the fact, that the defendant claims that it is also covered by the release. Touching the blinds, the controversy goes further, the plaintiff claiming that they are not covered by the contract, and the defendant claiming that they are.

The contract between the parties provided for the erection of the building according to plans and specifications under the direction of the defendant's superintendent, and further provided that, in case any alteration or change should be made in the construction, the cost and expense thereof was to be agreed on in

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writing, and such agreement was to be signed by the contractor and superintendent before the same was done, or before any allowance therefor could be claimed, and, in case of any failure so to agree, the same should be completed upon the original plan. So much of the specification as bears on the question for review is as follows:

"*Shutters and blinds.* The windows of front to have inside shutters in folds as marked on plans * * * all inside shutters to be cut into two heights.

"*Painting and glazing.* All the woodwork, tin and galvanized iron work to receive three good coats of strictly pure white lead, and linseed oil paint, in tints as will be directed, blinds to be Paris green, cornices in colors to match the cut-stone work. All the inside and outside work to be grained in number 1 imitation of antique oak or black walnut, with panels to imitate veneering, and to receive, including all hard wood, one good coat of best coach-body varnish."

No outside blinds were shown on the plans, but there was evidence to the effect, that it is not customary to show such blinds on the plans. It was conceded that the words, "blinds to be Paris green," had reference to outside blinds. The plaintiff's evidence was to the effect, that he always told the defendant that outside blinds were not covered by the contract, and that he refused to provide for them at first, and did so only upon the defendant's promise to pay for them. The defendant's evidence was to the effect, that he always insisted that the outside blinds were covered by the contract; that he never agreed to pay for them extra, and that both he, himself, and his superintendent told the plaintiff he would have to provide for the blinds under the contract.

The court instructed the jury, in substance, that the plaintiff under the contract was entitled to recover the reasonable value of the work and material for making and hanging the outside blinds, but not for

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painting them. The court further instructed the jury that if, at the time when the plaintiff signed the receipt, he was informed that the check for $368.82 was tendered to him unconditionally in full satisfaction of all claims against the defendant for work done and material furnished upon the building, and that he thereupon accepted and collected the check, the jury should find for the defendant. On the other hand if the jury found that, when plaintiff received the check, he stated to the defendant's agent, that he signed the receipt merely as in full of work done under the contract, and still claimed compensation for extra work, and that the agent assented thereto, then the plaintiff is not debarred by the receipt from recovering in this action.

The interpretation of written contracts is for the court. Where such contract is ambiguous in any of its terms, and the ambiguity can be resolved by reference to other parts of the contract, or surrounding circumstances which are uncontroverted by the evidence, it is likewise the duty of the court to solve the ambiguity and to declare the true meaning of the contract. But where the ambiguity cannot be solved by reference to other parts of the contract, and the surrounding circumstances are controverted, the court should charge the jury hypothetically as to the true interpretation of the contract. *Michael v. Ins. Co.*, 17 Mo. App. 23; *Fruin v. Railroad*, 89 Mo. 387; *Crawford v. Elliott*, 78 Mo. 497; *Shickle v. Chouteau, Harrison & Valle Co.*, 10 Mo. App. 241; affirmed 84 Mo. 161. In the event last named, the interpretation put by the parties themselves upon the contract is of great weight, if not controlling authority, because it is the duty of the court to give effect to the intention of the parties, where it is not wholly at variance with the correct legal interpretation of the terms of the contract. *Mathews v. Danahy*, 26 Mo. App. 660; *Sedalia Brewing Co. v. Waterworks*, 34 Mo. App. 49.

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Both parties claim in the case at bar that it was the duty of the court to solve the ambiguity in the contract by reference to the instrument alone, but the defendant claims that the making and hanging of outside blinds were included in the contract according to its correct interpretation, and that the court erred in declaring that they were not. The defendant's claim is supported by the fact, that outside blinds seem to be mentioned both as a subject with which the contract deals, in having a separate subdivision for shutters and *blinds*, and also by stating in the specification for painting, "blinds to be Paris green." The plaintiff concedes that the painting of outside blinds is mentioned, but claims that that fact does not necessarily include the furnishing of blinds, the material and construction of which is nowhere provided for, nor is there any evidence that it is an integral part of houses of that description to have outside blinds, nor are they shown on the plans, although there is some evidence that it is not usual that the plans should show them. The interpretation put by the parties themselves on that part of the contract is, according to the evidence adduced by them respectively, as above seen, directly opposed each to the other.

We conclude that the court erred, on this state of the evidence, in declaring the true meaning of the contract as a matter of law. The ambiguity in its terms is not removed either by reference to other parts of the contract, or by uncontroverted surrounding circumstances. It appears by the plaintiff's evidence that even contractors bidding on that part of the work were misled by the ambiguity of the terms. We hold that the case is one, where both parties were justified in putting the interpretation upon the contract which they claim to have put upon it, and that the court should have submitted the question to the jury, whether the plaintiff's or the defendant's evidence as to the interpretation put upon that part of the contract

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by both of them was true. The jury's determination of this question one way or the other would determine the intention of the parties, and hence the true interpretation of the contract.

The same error affects the ruling of the court as to the effect of the receipt. If the rulings of the court as to the interpretation of the contract are untenable, then the claim of the plaintiff for extra work stood upon the footing of a disputed claim and the plaintiff is concluded by his receipt. The case then simply stands this way: The defendant says all the work is covered by the express contract, and there is due to you thereunder the sum of $368.82, which amount I now tender to you in full of all your claims against the building. The plaintiff says all the work is not covered by the express contract. From the defendant's standpoint there was nothing else to settle except work covered by the express contract; hence, the plaintiff's argument, that the receipt speaks only of work due by express contract, has no force. If the jury finds that the work was covered by the contract according to its prior interpretation by both parties, the plaintiff is necessarily concluded by his receipt, because it covers all he had a right to demand, and the fact that he executed such receipt is evidence of the fact that he so regarded it, to be weighed by the jury with other evidence as to its interpretation by both parties. Payment of a part of a conceded debt in satisfaction of the whole is no liquidation, and even an agreement so to receive it is not supported by any consideration, and, therefore, not binding. *Reilly v. Kershaw*, 52 Mo. 226. But, where the claim is disputed, a party must accept a tender as made, or must reject it; he cannot accept it and prescribe the terms of acceptance. *Kronenberger v. Benz*, 56 Mo. 121; *Floerke v. Distilling Co.*, 20 Mo. App. 76; *Adams v. Helm*, 55 Mo. 469. Beyond this the settlement in this case was made by an agent, whose authority according to the defendant's evidence was limited, and

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the fact that it was so limited was communicated to the plaintiff. This fact, if established to the satisfaction of the jury, would of itself make the settlement of the disputed claim conclusive upon the plaintiff.

It results from the foregoing that the judgment must be reversed and the cause remanded. So ordered. All the judges concur.

ATHELIA C. WATSON, Respondent, v. WILLIAM STROMBERG, Appellant.

St. Louis Court of Appeals, November 10, 1891.

1. **Law and Fact:** CONSTRUCTION OF ORAL CONTRACTS. Where the terms of an oral contract are not admitted, it is for the jury to determine what the contract is.

2. **New Trial:** WEIGHING THE EVIDENCE. This court will not grant a new trial on the ground that the verdict is against the weight of the evidence, though the trial court may properly do so.

Appeal from the St. Louis City Circuit Court.—HON. JAMES E. WITHROW, Judge.

AFFIRMED.

E. S. Robert, for appellant.

Henry Boemler, for respondent.

ROMBAUER, P. J.—The plaintiff claims that she executed a quitclaim deed to certain lands in consideration of the defendant's promise to pay her $150, if she would do so. Upon the defendant's refusal to pay this sum she brought suit before the justice, and there, as well as upon a retrial of the cause in the circuit court, recovered a verdict for the entire amount claimed. The defendant seeks to vacate the judgment on the sole ground that it is unwarranted by the evidence, and that the court erred in refusing to nonsuit the plaintiff.

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The terms of the contract in this case were not reduced to writing. The law is that, where the terms of a contract are not admitted, but are to be ascertained from the oral evidence of witnesses, it is the province of the jury to determine from the evidence what the contract is. *Judge v. Leclaire*, 31 Mo. 137; *Jungemann v. Brewing Co.*, 38 Mo. App. 463. This general rule of course presupposes that there is substantial evidence showing the contract and its terms. After a careful reading of the record we are led to the conclusion, that it does furnish substantial evidence of the contract claimed by the plaintiff. It is true that her testimony is in part disingenuous and evasive, but the credit to be given to it as a whole is not for our consideration. In that regard the province of the trial court and ours is different. Many cases arise wherein the trial court may properly exercise its power in vacating a verdict as opposed to the weight of the evidence, and yet wherein we should not be justified in vacating it on the ground that it was brought about by bias or prejudice, or was unsupported by substantial evidence; and the present cause is of that class.

Here, under proper instructions of the court, the jury found the agreement as claimed by plaintiff, and, as they have done so upon substantial evidence, there was no legal error in refusing to vacate their verdict. We can reverse judgments for legal errors only. Judgment affirmed. All the judges concur.

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MARGARET F. SMITH, Respondent, v. DANIEL AUDE, Appellant.

St. Louis Court of Appeals, November 10, 1891.

Landlord and Tenant: SALE UNDER EXECUTION. A sale under execution of a lessor's title to land will not avoid a prior lease in the absence of evidence that the judgment, under which the execution was issued, was rendered before the lease was made.

Appeal from the St. Louis City Circuit Court.—Hon. Daniel D. Fisher, Judge.

Affirmed.

Rassieur & Schnurmacher, for appellant.

The sale of the landlord's title under a judgment or mortgage antedating the lease extinguished the lease and annihilated the rents reserved. *Simers v. Saltus*, 3 Denio, 214; *Duff v. Wilson*, 69 Pa. St. 316; *Lancashire v. Mason*, 75 N. C. 455; *Sampson v. Grimes*, 7 Blackf. 176; *Martin v. Martin*, 7 Md. 368.

Jas. P. Maginn, for respondent.

(1) A lessor enters into an implied covenant to keep the defendant in the quiet enjoyment of the premises during the term, and that is all he undertakes to do. So long as there is no breach of this covenant, the defendant is not released from the obligations of his lease. *Maider v. Carondelet*, 26 Mo. 112; *Hamilton v. Wright*, 28 Mo. 199. (2) Nothing but a release, surrender or eviction will absolve a tenant in whole, or in part, from the covenants in his lease. 1 Washburn, Real Prop. [3 Ed.] pp. 346, 361. (3) If a landlord sells the leased premises to another, the defendant is not thereby discharged of his obligation to pay rent to the vendor, unless the vendee give him notice that he claims the rent. *Gray v. Rogers*, 30 Mo. App. 258; *Green v. Sternberg*, 15 Mo. App. 35. (4) The marshal's sale under execution did not affect the respondent's actual possession of the premises, nor appellant's possession as her tenant. *May v. Luckett*, 48 Mo. 472; *Spalding v. Mayhall*, 27 Mo. 377; *Pentz v. Kuester*, 41 Mo. 447; *Higgins v. Turner*, 61 Mo. 250; *Kingman v. Abington*, 56 Mo. 46.

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Biggs, J.—On the first day of July, 1881, the plaintiff leased to the defendant for the period of ten years three vacant lots fronting seventy feet on Cass avenue. The lease stipulated for the payment of an annual rental of $150, payable in equal quarterly installments. As a further consideration for such letting the defendant covenanted to pay all taxes, whether general or special, assessed against the lots during the term. The record shows, and the plaintiff admits, that her title to the demised premises was, in November, 1881, divested by a sale under an execution issued upon a judgment against her in the United States circuit court for this district. The Metropolitan National Bank, of New York, purchased the property at the sale, and it received a deed therefor from the marshal of the court. After the purchase there was a verbal agreement between the bank and the plaintiff, that the plaintiff should receive the rents due under the lease during the continuation of certain litigation for the enforcement of certain mortgages on this and other property belonging to the plaintiff. Under this agreement, the plaintiff collected the rents from the defendant until October, 1888. There was no evidence in the case that the defendant knew of, or assented to, this agreement, but, on the contrary, he testified that he knew nothing of the sale, or the ownership of the property by the bank, until 1888. In August, 1888, after the defendant learned that the bank owned the property, he served a written notice on the plaintiff's agents that he would abandon the premises at the end of that quarter, which he did after tendering the possession to the plaintiff's agents. After the receipt of this notice the local agents of the bank notified defendant that the bank recognized the validity of the lease and that the plaintiff had authority to collect and receive the rents during the remainder of the term, and to enforce compliance with all covenants and agreements contained in the lease.

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The plaintiff brings this action to recover the amount of rent alleged to be due under the lease, to-wit, from October, 1888, to the date of the institution of the suit, and also to recover the amount of general taxes assessed against the property since its abandonment, and which the plaintiff claims to have paid; and also to recover the amount paid by the plaintiff in satisfaction of a judgment rendered against the property on a special tax bill for the reconstruction of Cass avenue in front of the premises. The defense was predicated on the aforementioned facts, which were set forth in the defendant's answer. The cause was submitted to the court without a jury, and the finding and judgment were for the plaintiff for the amounts sued for.

The defendant asked the court to instruct that, under the pleadings and evidence, the plaintiff could not recover. This instruction was refused, and this action of the court presents the only question for review on this appeal.

If the lease in question was a valid contract of renting as to the Metropolitan National Bank as purchaser, then the defense here made is not available.

We understand the rule to be that, if the lease or contract antedates any right, interest or title acquired by the purchaser by means of his conveyance, then the purchase is in subordination to the lease. This is true, whether the conveyance be voluntary or *in invitum*. In other words the extinguishment of the lessor's title will not avoid the lease either as to the tenant or purchaser. The sale merely operates as a transfer of the lessor's title and of his rights under the lease to the purchaser. The purchaser may exhibit to the tenant his deed, and demand of him that he attorn and pay to him the subsequently accrued rents. If the tenant refuses, the purchaser may oust him by proper proceedings. *Gunn v. Sinclair*, 52 Mo. 327; *May v. Luckett*, 54 Mo. 437; *Clampitt v. Kelley*, 62 Mo. 571;

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Lindenbower v. Bentley, 86 Mo. 515; *Higgins v. Turner*, 61 Mo. 249; *Barclay v. Pickles*, 38 Mo. 143; *Stevenson v. Hancock*, 72 Mo. 612; *Winfrey v. Work*, 75 Mo. 55; *Pentz v. Kuester*, 41 Mo. 447; R. S. 1889, secs. 6398, 6397, 6387. But if, in such a case, the purchaser fails to demand of the lessee the rents, or fails to ask him to attorn, the latter's obligation to pay rents to the lessor remains, and he will be protected in such payment until notified by the purchaser not to pay. *Gray v. Rogers*, 30 Mo. 261.

But the defendant's counsel argue that a different rule of law is applicable in this case. It is asserted as a proposition of law that, when a lease or contract of renting is *subsequent* to a judgment against the lessor, which judgment is a *lien* on the demised premises, a purchaser under an execution to enforce such a judgment would occupy a very different relation to the tenant under such a lease. This position is supported by the argument, that such a sale would annihilate the lease, and would leave no privity either of contract or estate between the tenant and the purchaser, and that it would necessarily follow that the tenant would be at liberty to abandon the premises if he saw proper. There is a great deal of force in the argument, and very respectable authorities support it. But it is useless to discuss the question, because the record does not disclose the fact that the judgment *was a lien* on the demised premises at the date of the lease. The defendant's answer contained the single averment that, in November, 1881, the property was sold under an execution issued upon a judgment rendered against the plaintiff in the United States circuit court for this district. But we find nothing tending to show the date of the judgment. If it were permissible for us to draw the inference, that the judgment must necessarily have antedated the lease, by reason of the sale at the next term of the court after the date of the lease, then, before we could decide that the judgment was a lien, we would

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be compelled to infer the further fact, that the judgment was rendered within three years next preceding the date of the lease (R. S. 1889, sec. 6012), and perhaps that an abstract of the judgment was registered with the clerk of the circuit court of the city of St. Louis at the date of the lease. R. S. 1889, sec. 6057. The lien of a judgment is a creature of the statute. At common law it was the delivery of an execution to the sheriff that created a lien. Therefore, in the absence of a law of congress on the subject, we apprehend that, if judgments rendered in the United States courts are liens at all, such liens must exist by virtue of the state law. If so, then such judgment liens stand on the same footing as the liens of judgments in the state courts, and are subject to the same restrictions and limitations. *Massingill v. Downs*, 7 How. 760; R. S. U. S. 1878, sec. 967. This, we think, makes it clear that the defendant failed to establish by his proof the case he argues in his brief. In other words, we are of the opinion that the defendant's evidence did not amount to a defense to the plaintiff's action.

With the concurrence of the other judges, the judgment of the circuit court will be affirmed. It will be so ordered.

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Ambrosius Zurfluh, Respondent, v. The People's Railway Company, Appellant.

St. Louis Court of Appeals, November 10, 1891.

1. **Practice, Appellate**: REMITTITUR: EXCEPTIONS. The propriety of a voluntary *remittitur* by a plaintiff of a part of the damages assessed by the verdict cannot be reviewed on appeal, unless an exception was taken by the defendant to the action of the trial court in permitting the *remittitur* to be made.

2. **Practice, Trial:** ACTIONS FOR PERSONAL INJURIES: REMITTITUR. *Semble* that, in an action wherein the damages are incapable of measurement by an exact money standard, such as actions for personal injuries, the defendant's right to object to the verdict as excessive cannot be obviated by a *remittitur* by the plaintiff of a part of the damages assessed.

3. **Street Railroads:** SUFFICENCY OF THE EVIDENCE OF NEGLIGENCE. *Held* that the evidence in this cause, which was one for damages occasioned by a collision with a street railway car, did not warrant the submission of the cause to the jury, since the right of recovery was predicated on the theory that the defendant's driver could have stopped the car in time to avert the injury after he saw, or by the exercise of ordinary diligence could have seen, the perilous position of the plaintiff, and since there was no evidence whatsoever of the space within which the car could have been stopped, nor as to distance of the plaintiff from the car, when the plaintiff's peril could first have been observed.

4. **Practice, Appellate:** JUDGMENT ON APPEAL. *Held per curiam* that a judgment simply of reversal should be entered on the appeal of a cause, wherein the trial court ought to have nonsuited the plaintiff, but failed to do so, and that such judgment of reversal was equivalent merely to a nonsuit, and, therefore, not a bar to another action.

5. ——— : ———. But *held* by BIGGS, J., *dissenting*, that in such case the judgment should be reversed and the cause remanded for another trial, unless the evidence warranted a final judgment by the appellate court for the appellant.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

REVERSED.

T. J. Rowe, for appellant.

Rassieur & Schnurmacher, for respondent.

BIGGS, J.—The plaintiff sues for personal injuries which he claims resulted from the careless or negligent operation of cars on defendant's street railway. The defendant's railway is what is known as a cable road, and consists of a double track. It runs south along Mississippi avenue to LaFayette avenue, at which point it turns west and extends along LaFayette avenue for a

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considerable distance. There was a collision between one of the defendant's cars and the plaintiff's wagon, which he was driving, by which the plaintiff claims he was thrown onto the street and injured. The jury returned a verdict for the plaintiff in the sum of $1,500. The defendant filed a motion for a new trial, in which it was claimed that the amount of damage assessed by the jury was excessive. During the pendency of this motion the plaintiff remitted the sum of $500, and the court thereupon overruled the motion and allowed the judgment to stand for the remainder. The defendant brings the case here by appeal.

I. The defendant's counsel insists that the judgment is excessive notwithstanding the *remittitur*. As we are of the opinion that the judgment must be reversed on other grounds, the expression of our opinion of the amount of damage under the evidence becomes unnecessary. Whether the voluntary *remittitur* was authorized or not, is not a question before us, for the reason that the defendant failed to object and except to the action of the court in permitting it to be done. But in this connection we wish to call attention to the decision of the supreme court in the very recent case of *Gurley v. Railroad*, 16 S. W. Rep. 11. The reasoning of the court in that opinion would certainly condemn such a practice. It is the last utterance of the court on that subject, and must be held to be law notwithstanding what was said on the same subject in the case of *Furnish v. Railroad*, 102 Mo. 438. In the *Gurley case* the court decided, and very properly so we think, that in actions for personal injuries and other actions, where the damages cannot be measured by an exact money standard, the supreme court cannot allow a *remittitur* to be made. A *remittitur* is treated as destructive of the integrity of the verdict, and as tantamount to the assessment of the damages by the court itself. The logic of the reasoning of the court is that, when the court is satisfied that such a verdict is excessive, this

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conclusion is a strong evidentiary fact that a fair trial on the merits has not been had, and that, if the judgment is to be disturbed at all, it ought to be set aside altogether. If it is beyond the power of the supreme court to enter a *remittitur*, then the plaintiff ought not to be allowed to reconstruct a verdict in his favor by a voluntary *remittitur*.

II. Prior to and at the time of the accident, plaintiff was driving a team of horses attached to a loaded wagon west along LaFayette avenue. When he reached the point of intersection of LaFayette and Mississippi avenues, he attempted to cross the defendant's railway tracks for the purpose of pursuing his way along the north side of LaFayette avenue. In doing so his wagon was struck by one of the defendant's cars which was going south on the west track. It seems that all cars going south use the west track, and that those going north use the east track. The acts of negligence stated in the petition were, in substance, that the gripman on the defendant's car failed to give a sufficient warning of the approach of the car, and that he did not use that care which the law requires to avoid the collision after he discovered, or by the use of ordinary vigilance might have discovered, the danger to which the plaintiff was exposed. When the evidence was all in, the plaintiff seems, as shown by his instructions, to have placed his right of recovery solely on the ground that the defendant's servants might have avoided the injury, if they had made proper efforts to stop the car after they discovered, or by the use of ordinary diligence might have discovered, his perilous position. The instructions are as follows: "The court instructs the jury that, even though they may find and believe from the evidence that plaintiff was careless in undertaking to drive across defendant's track without looking for approaching trains, yet, if they also believe that defendant's employes in charge of its trains saw the plaintiff, or by the exercise of ordinary care would have seen him,

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after he came into a position where he was likely to be injured by the car in question, in time to have stopped the train by the exercise of ordinary care and the reasonable use of the means at their command, and to have avoided a collision with and injury to plaintiff, then they will nevertheless find a verdict for plaintiff."

"The court instructs the jury that plaintiff had an equal right with defendant to use the public streets of the city of St. Louis, and had a right to cross defendant's tracks upon such street and to assume that defendant's employes operating its trains would be on the lookout and give him some warning of the approach of such trains, if by reason thereof there was any danger of collision with plaintiff. If, therefore, the jury believe from the evidence that on December 23, 1890, the plaintiff was driving westwardly along the north side of LaFayette avenue, and that in passing over Mississippi avenue he started across the tracks of defendant; that, while upon the tracks, his wagon was run into by a train of defendant's cars, operated by its employes, and that he was thrown upon the street and injured; that defendant's employes saw, or by the exercise of ordinary care and caution could have seen, that plaintiff was in danger of being struck by the train, and that they could thereupon, by the exercise of ordinary care and the reasonable use of the means at their command, have stopped said train in time to have avoided a collision, and that they failed to do so, then the jury will find a verdict for plaintiff."

The defendant's contention is, that the evidence in the case did not authorize these instructions.

It is fairly inferable from the plaintiff's own testimony that he was careless in his approach to the defendant's tracks, and in attempting to cross them in the manner in which he did. And it may also be said that his evidence failed to show that the defendant's servants in charge of the car failed to give the usual warning in approaching a crossing, or when danger to

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persons on the street was to be apprehended. The plaintiff admitted that he could have seen the car, if he had only looked, as soon as he reached Mississippi avenue; that, when his horses reached the easterly track, he heard the bell on the car; that then for the first time he looked and saw the car approaching from the north, about one half block away; that he did not stop because he thought he had sufficient time to get across ahead of the car; that he attempted to do so, but, before he reached the west track on which the car was approaching, he thought that there was danger of a collision, and that he had better turn south, and did so; that, when he made this turn he saw another car approaching from the west about one block distant, and this caused him to again attempt to cross the west track, and that in doing so the car struck one of the hind wheels of the wagon. Under this condition of the proof the plaintiff's counsel, as we have indicated, seem to have abandoned the idea that their client was without fault, or that the defendant was negligent in the first instance. They properly recognized that it was the duty of the plaintiff to take some thought or care for his own safety, while traveling along the streets of a populous city. Hence the only possible theory, upon which a recovery could be had, was a failure on the part of the defendant's servants to use proper care and efforts to avoid injury to the plaintiff after they discovered, or by the exercise of ordinary vigilance might have discovered, the danger.

The first question that presents itself is, at what point of time may it be said that the plaintiff was in a perilous position. He said that the first time he started to cross the track he concluded that, on account of the speed of the car, it was not safe to make the crossing. But subsequent events showed that his fears were entirely groundless. As it was, he almost succeeded in getting over without injury, as the car only ran a distance of three feet after the collision. If the plaintiff had gone across in the first instance, the car could easily have

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been stopped before any harm could have been done, because the plaintiff himself testified that, at the time he first saw the car, it was far enough away to have been stopped twice. Just how far that was he does not say. The conclusion is a fair one that the plaintiff was not in peril until he attempted to cross the second time.

Now the difficulty which we encounter is, that the plaintiff's evidence fails to show how far away the car was, when he started the second time to cross the track, and within what distance the car could have been stopped. It seems to us that it was absolutely necessary for the plaintiff to introduce some evidence tending to prove these facts. Otherwise, it would be impossible for the jury to decide intelligently, whether the defendant's servants were lacking in diligence or not, or whether they used proper efforts to stop the car or not. The defendant's evidence on the same subjects in no way aids the plaintiff's case; but on the contrary, if the testimony of the gripman is to be credited, it was impossible to avoid the accident. He testified, in substance, that he saw the plaintiff approaching the crossing; that he sounded the gong and placed the car under control until he could determine whether the plaintiff intended to cross in front of the car or not; that he saw the plaintiff turn his horses' heads to the south along the easterly track, and that, acting under the belief that the plaintiff did not intend to make the crossing, he applied the grip to the cable and entered the curve at full speed; that, when he was eighteen or twenty feet from the plaintiff, the latter suddenly and without any previous warning attempted to cross in front of the car, and that he used every means to stop the car before the collision, but that it was impossible to do so under the circumstances.

We are, therefore, of the opinion that the plaintiff's instructions were not authorized by the evidence, and

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that the verdict and judgment were against the law and the evidence.

The other questions presented by the briefs, we need not discuss.

My associates concur in this opinion, but we differ as to the proper disposition of the case. They are of the opinion that the cause ought not to be remanded, but a simple order of reversal be entered. I understand their position to be that a simple reversal is not an adjudication on the merits but is equivalent only to a nonsuit; that in the present case the plaintiff ought to have been nonsuited, as asked by the defendant, and that it is the duty of this court to make such judgment as the circuit court ought to have made. I think the proper practice is to remand a cause, unless the proof is such as to authorize this court to make a final judgment for the appellant. Now, if in the present case plaintiff had undertaken to prove how far he was from the approaching car, when he attempted to cross the track the second time, and within that space the car could have been stopped, and such evidence was deemed by us insufficient to establish a liability against the defendant, then I would not be in favor of giving the plaintiff an opportunity to amend his swearing. But when it appears, as it does in this case, that the failure to make the proof in respect of a vital point might have resulted from inadvertence, I do not think the plaintiff ought to be forced to begin his action anew. My associates, however, think differently. The judgment of the circuit court will be reversed.

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ALICE M. SPENGLER, Respondent, v. KAUFMAN & WILKINSON, Garnishees of LOUIS P. SPENGLER, Appellants.

St. Louis Court of Appeals, November 10, 1891.

1. **Executions:** EXEMPTIONS: HEAD OF A FAMILY. While a man, who lives with and supports his widowed mother and his sisters, is ordinarily deemed to be the head of a family within the purview of the statute providing for exemptions from the levy of process on property, still he is not to be so considered, when the claim of exemption is invoked against an execution issued under a judgment which his wife has obtained against him for maintenance, since the allowance of this claim in such a case would be a perversion of the purposes of the statute.

2. **Fraud:** SUFFICIENCY OF EVIDENCE. *Held*, that, while the verdict of a jury on an issue of fraud cannot be predicated on mere conjecture or suspicion, still very slight circumstances will warrant the submission of the issue to the jury in a case like the one at bar—it being one wherein a husband, in order to defeat the levy of an execution issued on a judgment which his wife had obtained against him for maintenance, required his employers to pay him his wages in advance, and his employers acquiesced in his demand with notice of its purpose, but claimed that they did so because they had need for his services, and feared that he would otherwise quit their employ, as he had threatened to do.

Appeal from the St. Louis City Circuit Court.—HON. JAMES E. WITHROW, Judge.

AFFIRMED.

Rassieur & Schnurmacher and *W. C. & J. C. Jones*, for appellants.

(1) The court erred in excluding evidence offered by the garnishees to prove that the defendant was the head of a family. They were not, in so doing, seeking to claim any personal exemption for defendant. Under the statute, if he was the head of a family, they were

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exempt from the process of garnishment, and were not liable for the payments made to defendant after garnishment. R. S., sec. 5220; *Davis v. Meredith*, 48 Mo. 263; *Marigold v. Dooley*, 89 Mo. 111. (2) An agreement to pay wages, weekly or monthly, in advance, if made in good faith, is valid, and, if the payments are in fact made as agreed upon, the employer cannot be made liable in garnishment proceedings. *Reinhart v. Soap Co.*, 33 Mo. App. 24; Wade on Attach., sec. 473, p. 295; *Archer v. Bank*, 88 Ala. 249; *Alexander v. Pollock & Co.*, 72 Ala. 137; *Callaghan v. Mfg. Co.*, 119 Mass. 173; *Feeter v. Williams*, 3 B. Mon. 562. (3) There was no evidence in this case from which the jury could determine or even infer that the agreement to pay defendant's wages in advance was entered into by garnishees with a fraudulent intent, or to aid defendant in such an intent. All the evidence presented was to the one effect, that the garnishees needed defendant's services, and that they yielded to his demand rather than lose him as an employe. This they had a legal right to do, and, in so doing, in no way injured plaintiff. Had they declined to make the agreement, defendant would have quit their employ, and plaintiff would have been none the richer. There was no evidence to support a verdict, and the court should have taken the case from the jury. For the same reason this court should set aside the judgment entered upon such verdict. *Polack v. Hanauer*, 26 Mo. App. 261; *Moore v. Railroad*, 28 Mo. App. 622; *Klostermann v. Kage*, 39 Mo. App. 60; *Garesche v. MacDonald*, 103 Mo. 1.

Ford Smith, for respondent.

(1) The question of fraud is one for the jury. There was evidence to sustain the verdict. The jury is the sole judge of the weight of evidence, and its finding will not be disturbed on appeal. *Chubbuck v. Railroad*, 77 Mo. 591, 594; *Reinhart v. Soap Co.*, 33 Mo.

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App. 24, 27; *Hopkins to use v. Seivert*, 58 Mo. 201, 202; *Earl v. Hart*, 89 Mo. 263, 270; *State v. Jackson*, 99 Mo. 60, 61; *Oglebay v. Corby*, 96 Mo. 285; *Hill v. Scott*, 38 Mo. App. 370; *Rosecrans v. Railroad*, 83 Mo. 678, 682; *State v. Hall*, 85 Mo. 669, 673; *Dulaney v. Rogers*, 64 Mo. 201, 205; *Sexton v. Anderson*, 95 Mo. 373; *Frederick v. Allgaier*, 88 Mo. 598, 602, 603. (2) The testimony that Spengler was living with his mother and sisters was properly excluded. It did not tend to prove that Spengler, as against this plaintiff, was the head of a family. Nor was it admissible under the pleadings. *Spengler v. Kauffman & Wilkinson*, 43 Mo. App. 5.

Biggs, J.—This is a garnishment under execution. On the trial the jury found that the garnishees were indebted to the defendant in the execution in the sum of $785.65. The amount due the plaintiff under the execution was $518.60, and this, the court ordered the garnishees to pay into court. They failed to do this, and thereupon the court entered a judgment against them for that amount. From that judgment they have appealed.

The counterpart of this proceeding was before this court once before. *Spengler v. Kaufman*, 43 Mo. App. 5. In the opinion in that case the reply and denial are set forth, and a full statement made of the facts and circumstances out of which the litigation arose. The present garnishment is based on a subsequent execution issued upon the same judgment, but the proceedings at the trial were substantially the same as in the former case. Whatever matters of difference there were will be now noticed.

In the former opinion we held that the plaintiff's denial was not broad enough to squarely put in issue the good faith of the agreement between the defendant in the execution and the garnishees, under which the wages of the defendant were to be paid in advance. In

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the present proceeding we think that objection has been obviated. The plaintiff's denial contains among other averments the following:

"And plaintiff avers, and states the fact to be, that she is the wife of said defendant, Louis P. Spengler; that she was married to said Spengler in the month of October, 1887; that in the month of January, A. D. 1888, said defendant Spengler deserted and abandoned this plaintiff and refused to live with or support her, and since said time has refused to live with or support her, and has not lived with, or contributed to the support of, this plaintiff from the time of said abandonment until the present time; that in the month of December, 1888, in this court, she obtained judgment against said defendant, Louis P. Spengler, for her support and maintenance; that, by said judgment against said defendant, Louis P. Spengler, it was adjudged and decreed that said Spengler pay to this plaintiff as and for her support and maintenance the sum of $25 per month, the first payment of $25 to be due and payable under said judgment on the fifteenth day of December, 1888, and a like sum of $25 to be due and payable thereunder on the fifteenth of each and every month thereafter; that said Spengler has paid nothing under or on account of said judgment; that said defendant, Louis P. Spengler, is, and ever since the first day of February, A. D. 1889, has been, in the employment of said garnishee as bookkeeper and collector at a salary of $75 per month; that in the month of April, 1889, under an execution issued from this court in her favor and against said defendant, Louis P. Spengler, under the judgment aforesaid, she caused a process of garnishment returnable to the June term, 1889, of this court to be served upon said garnishee, and has caused garnishments to be served upon said garnishee, under executions issued under said judgment, returnable to each term of this court, between said June term, 1889, and the term of court to which the garnishment herein is

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returnable; that all of said garnishments are still pending in this court and undetermined; and plaintiff states that the agreement entered into between said defendant and said garnishee, and set up in said garnishee's answer, to pay said defendant his salary in advance was made and entered into after the service of the process of garnishment aforesaid upon said garnishee in the month of April, 1889, and was made and entered into by said defendant Spengler with the fraudulent intent and purpose to defeat said garnishment, and with the intent and purpose to cheat and defraud this plaintiff out of her just claim against him, and to fraudulently place his property and salary and money out of the reach of the process of this court, and to fraudulently prevent her from collecting her said judgment against him, and to embarrass, hinder, delay and defraud this plaintiff in the collection of her said judgment and debt from him; that said garnishee entered into said agreement with said defendant after the service of the process of garnishment upon it as aforesaid, and that, at the time it entered into said agreement with said defendant to pay him his wages in advance, said garnishee knew that plaintiff had recovered said judgment against said defendant, and that the same was for her support and maintenance, and knew at the time of entering into said agreement with said Spengler that said Spengler sought and entered into said agreement with the fraudulent intent and purpose aforesaid, and entered into said agreement with said Spengler and agreed to pay him his salary in advance to aid and assist him, and for the purpose of aiding and assisting him to carry out his said fraudulent intent and purpose, and that said garnishee entered into said agreement with the same fraudulent intent and purpose to cheat and defraud this plaintiff and to fraudulently prevent her from collecting her said claim and judgment against said Spengler, and to fraudulently defeat said garnishment and the process of this court,

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and to embarrass, hinder, delay and defraud this plaintiff in the collection of her said judgment and debt from him, and to fraudulently place the property, salary and money of said Spengler out of the reach of this plaintiff and out of the reach of the process of this court."

One of the defenses in the first proceeding, and upon which the garnishees now insist, was, that the contract provided for the monthly payment of the salary in advance; that they had complied therewith, and that they were not indebted to the defendant for wages in any amount subject to garnishment for the reason that he was the head of a family. This defense involves the right of Spengler to claim his statutory exemptions where his wife is seeking to enforce a judgment against him for her maintenance.

In the first case we declined to pass on the question, because there was no evidence that the defendant was the head of a family, other than as the husband of the plaintiff. In the present proceeding the garnishees offered proof to the effect that the defendant, his widowed mother, and unmarried sisters were living together, and that the wages of the defendant were applied to, and constituted the only means of, their support. The court excluded this evidence, and upon this ruling of the court is based the appellants' first assignment of error.

I. Our statute (R. S. 1889, sec. 5220) exempts certain persons from liability as garnishees. The section referred to contains the following clause: "Nor shall any person be charged as garnishee on account of wages due from him to a defendant in his employ for the last thirty days' service, provided such employe is the head of a family, and a resident of this state."

It is the settled law of this state that the relation of husband and wife, or father and child, need not exist to constitute a family, or to constitute the managing and responsible person of a household, the head of a family, within the meaning of our exemption laws.

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In the case of *Wade v. Jones*, 20 Mo. 75, the party claiming the exemptions had his widowed sister and her children living with him. The sister kept house for him, and he provided and supported the family. The court held that he was the head of a family. In the case of *Duncan v. Frank*, 8 Mo. App. 286, this court decided that an older brother, who, with his elder sister, kept house for his younger brothers and sisters, was the head of a family. In *Nash v. Norment*, 5 Mo. App. 545, this court also decided that, where a married woman had been abandoned by her husband, and she is supporting her child, she must be considered the head of a family within the meaning of the execution law.

But in these cases, as well as others which we have examined, the contests were between ordinary debtors and the householder or head of the family. Here we have a different case. The plaintiff seeks by legal process to compel her husband to support her, as he is legally bound to do. If the appellant's construction of the statute is to prevail, then its enforcement against the plaintiff becomes the means of oppression, rather than of protection. This would entirely subvert the law, and defeat the intention of the legislature. The defendant's obligation to support his mother and sisters is a moral one only, and he is to be commended for so doing; but his obligation to support his wife rests on legal, as well as moral, grounds, which we think makes the obligation a paramount one. As to ordinary creditors the statute would protect the fund for the benefit of the mother and sisters, but not as to the claims of the wife for maintenance. It would be very strange, indeed, if the defendant could shield himself under the exemption statute, when his wife was seeking to compel him to support her, to secure which was one of the chief objects of the law. We will rule this assignment against the appellants.

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II. It is next insisted that there was no evidence, from which the jury could determine that the agreement to pay the defendant's wages in advance was entered into by the garnishees with a fraudulent intent to defeat the plaintiff in the collection of her judgment. We understand that the legality of this agreement, and that the appellants will be protected in the payment of wages thereunder, are conceded, provided the contract was made in *good faith*. Therefore, the *bona fides* of the transaction is the only matter in dispute. On that issue the jury was instructed that, to entitle the plaintiff to a verdict, they must believe and find from the evidence that Spengler demanded that the garnishees should pay his salary in advance for the purpose of defrauding the plaintiff out of her claim against him, and for the purpose of preventing her from subjecting his wages to the payment of her said claim, and that this purpose was known to the garnishees at the time they made the agreement to pay him his wages in advance, *and that the garnishees entered into said agreement to assist him therein.*"

It must be conceded that the instruction presented the issue to the jury in a way quite favorable to the appellants, possibly more so than the law warranted. It will be observed that the jurors were told that knowledge by the defendants of a fraudulent purpose by Spengler was not sufficient, but that, to render them liable for the money paid, the jury must find that they entered into the agreement for the purpose of aiding Spengler in his fraudulent designs.

The evidence leaves no doubt concerning the purpose of Spengler. His sole object was to defeat the enforcement of the plaintiff's judgment. Nor can it be said that the defendants were not fully advised of this purpose. Therefore, the only question is, was there any substantial evidence that the defendants participated in the fraud. The plaintiff introduced Kaufman as a witness. He knew nothing personally about the making

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of the contract. He was informed of it by Wilkinson, and ratified it. Wilkinson made the contract with Spengler, and the plaintiff read in evidence the notes of his testimony taken by a stenographer on the first trial. Wilkinson testified that, after the service of the first garnishment, Spengler demanded his wages in advance, and threatened, in case of non-compliance, to quit work; that he was a very valuable man, and that, rather than that the firm should lose his services, he agreed to pay him his salary monthly in advance, and that he did not do this to aid Spengler to defeat the enforcement of the plaintiff's judgment. It is conceded by the appellants' counsel that the jury was not bound to believe their client's protestations of innocence of any fraud, even though he testified at the instance of his adversary, if there were other facts and circumstances which would justify a contrary conclusion. Now, it is quite true that the verdict of a jury on an issue of fraud cannot be predicated on mere conjecture or suspicion; but, in a case like the one which we have here, very slight circumstances would be sufficient to authorize the jury to find that the contract was entered into to embarrass creditors. *Reinhart v. Soap Co.*, 33 Mo. App. 24; *Fay v. Smith*, 25 Vt. 610.

The following are the salient facts as disclosed by the record: That Wilkinson and Spengler had been close friends for many years; that, at Spengler's marriage, Wilkinson acted as groomsman; that, in February, 1889, Spengler was employed by the appellants, who were then in the lumber trade, to keep their books at a monthly salary of $75; that, at the time, Spengler and his wife were living apart, and her suit for maintenance was then pending; that, in April, 1889, an execution was issued on the plaintiff's judgment in the suit for maintenance and the appellants were summoned as garnishees; that, when the first garnishment was served, Wilkinson told Spengler "that he did not like this garnishment business and that he must protect himself;"

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that he (Spengler) said he would quit work, unless his salary was paid in advance; that, at the time, Wilkinson was in very bad health, and the business of the firm was such that Spengler, who was a very competent man, could not well be spared; that, rather than be deprived of Spengler's services, the appellants agreed to pay his wages in advance; that afterwards garnishments were regularly served on the appellants for each succeeding term of the circuit court, and that, on the first day of January, 1890, Spengler's salary was advanced to $100 per month.

Now upon this state of facts a jury of ordinary intelligence might have reasoned in this way: That, if Wilkinson had not been controlled by a feeling of friendship for Spengler, and a desire to aid him in defeating the enforcement of the plaintiff's judgment, common business prudence would have suggested to him that it was better to discharge Spengler, however valuable his services might have been, or whatever might have been the condition of the firm's business, rather than involve his firm in costly litigation. And to strengthen this position the jurors might have argued that, at the time when Spengler's salary was increased, the appellants, if they had had only their own interests in view, would have insisted that this increase should be paid to the plaintiff, thereby relieving themselves of other garnishments. Or the jurors might have considered the statement made by Wilkinson to Spengler to the effect, that Spengler must protect himself against the garnishment, as a suggestion that he, Wilkinson, was ready to aid him in doing so. Such a line of thought or process of reasoning could not, in our opinion, be said to rest solely on conjecture or suspicion. It finds some warrant in the circumstances of the case. We will, therefore, rule this assignment likewise against the appellants.

III. Objection is made to the plaintiff's first instruction. If we rightly understand the nature and

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extent of the objection, what we have already said disposes of it adversely to the appellants. With the concurrence of the other judges, the judgment of the circuit court will be affirmed. It is so ordered.

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PETER BAUER, Respondent, v. M. BARNETT, Appellant.

St. Louis Court of Appeals, November 10, 1891.

1. **Justices' Courts:** SUFFICIENCY OF THE STATEMENT OF THE CAUSE OF ACTION. The statement of a cause of action in a suit instituted before a justice of the peace is sufficient, if it advises the defendant of the nature of the cause of action, and is sufficiently definite to bar another action for the same matter.
2. **Practice, Appellate:** FAILURE OF APPELLANT TO FILE MOTION FOR NEW TRIAL IN TIME. If an appellant fails to file a motion for new trial within the requisite time, only errors which appear on the face of the record proper can be noticed on the appeal.

Appeal from the St. Louis City Circuit Court.—HON. LEROY B. VALLIANT, Judge.

AFFIRMED.

Wm. P. Macklin and *Jno. B. Dempsey*, for appellant.

C. A. Schnake, for respondent.

BIGGS, J.—This case originated before a justice of the peace in the city of St. Louis. On the defendant's application there was a change of venue to another justice. On the trial the defendant had a judgment, and on the day of trial the plaintiff took an appeal to the circuit court. The appeal was taken on the fourteenth day of July, 1890, and the papers were filed with the clerk of the circuit court on the nineteenth day of July following. There is no record entry concerning the case at the October term of that court following the appeal. On the ninth day of February, 1891, at the February term of the circuit court, the case was called

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for trial. The defendant failed to appear, and a judgment by default was taken against him. Upon an inquiry of damages, the judgment was made final. The motion for a new trial was filed eleven days after the final judgment was entered.

The defendant's motion for a new trial was filed out of time. In such a case we can only notice errors which may appear on the face of the record proper. *Bagby v. Emberson*, 79 Mo. 139; *Funkhouser v. Mallen*, 62 Mo. 555.

The defendant challenges the sufficiency of the statement upon which the action was brought. The statement filed before the justice reads:

"*M. Barnett, to Peter Bauer, Dr., 1211 S. Third Street.*

"To amount paid him in cash, $6, and the value of a silver watch, $10, handed him, all to be the price of a silver watch bought of him, and warranted to be a good timepiece, and which proved to be the contrary .... $16 00."

The rule is that the statement filed for suit before a justice of the peace is sufficient, if it advises the defendant of the nature of the action, and is sufficiently definite to bar another action for the same matter. Under the very liberal rulings of our courts the statement, which we have here, is sufficient. Much more indefinite statements have passed muster, both in this court and the supreme court.

It is also claimed by the defendant that the judgment cannot stand, because the circuit court had no jurisdiction by reason of some informality in the application for the change of venue. This objection is unusual and hard to comprehend, when it is considered that the change of venue was on the defendant's application, and the record shows that he appeared before the justice, to whom the case had been sent, and defeated the

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plaintiff in his action. There is no merit in such a contention. Neither is there anything in the claim that the defendant was entitled to notice of appeal. If it were permissible for us in the present state of the record to pass on the question, it would only be necessary to refer to the statute. R. S. 1889, sec. 6342. When an appeal is taken from a justice on the day of trial, no notice of appeal is required. We only refer to this last point to show that this appeal is frivolous and destitute of any merit.

The judgment will be affirmed with ten-per-cent. damages as requested by plaintiff. All the judges concur.

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H. T. Bennitt, Respondent, v. The Missouri Pacific Railway Company, Appellant.

St. Louis Court of Appeals, November 10, 1891.

1. **Common Carriers:** EXEMPTION FROM COMMON-LAW LIABILITY. It is questioned whether, even in the absence of a prohibitive statute, an agreement in a bill of lading exempting the carrier from his liability at common law is binding, unless it is supported by a special consideration.

2. ——— : TERMINATION OF CARRIER'S RATE. A bill of lading for the transportation of goods from Hillsboro, Texas, to Galveston, in the same state, and for the delivery at the latter place to the consignee or a connecting carrier, is not a contract for carriage beyond that place, notwithstanding that it guarantees a through rate of freight to a town in Connecticut, which is named in it as the ultimate point of destination of the goods.

3. **Practice, Trial:** INCONSISTENT POSITIONS. When a consignor sues a carrier for a loss of the goods carried, and predicates his claim upon the theory that the transit was to end at a given point, and, therefore, lay wholly within a certain state, the defendant carrier is not precluded from claiming that he had carried the goods to said point, and had ceased to hold them as a carrier, by the fact that he had pleaded in his answer that the transit contracted for extended beyond said point and state.

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4. ——— : TERMINATION OF LIABILITY AS CARRIER. A carrier holds goods as such, and not as a bailee, while he holds them for delivery to a succeeding carrier; and, although the connecting carrier refuses, or unreasonably delays, to receive them, the first carrier will still hold them as carrier until, by warehousing them, or otherwise, he does some unequivocal act indicative of a purpose to change his office from that of a carrier for transportation to that of a mere custodian for safekeeping. So long as he holds the goods in his vehicles of transportation, awaiting the pleasure, the convenience or the necessities of the succeeding carrier, his liability as carrier continues.

Appeal from the St. Louis City Circuit Court.—HON. JAMES E. WITHROW, Judge.

AFFIRMED.

H. S. Priest and *H. G. Herbel*, for appellant.

(1) The court erred in overruling the defendant's demurrer to the evidence and motion for a new trial. *Coates v. Express Co.*, 45 Mo. 241; *Ryan v. Railroad*, 65 Tex. 13; *Railroad v. Railroad*, 37 Fed. Rep. 571; *Whiteworth v. Railroad*, 87 N. Y. 417; *Railroad v. Daniels*, 32 Am. & Eng. R. R. Cases, 480; *Railroad v. Grate Co.*, 9 S. E. Rep. 600; *Welsh v. Railroad*, 41 Conn. 333; *Stanley v. Railroad*, 100 Mo. 438; *Railroad v. Park*, 1 Tex. App. (White & Wilson's Civil Cases) secs. 332, 335; *Railroad v. Harris*, 1 Tex. App. 1260; *Railroad v. Gatewood*, 14 S. W. Rep. 913; *Railroad v. Davis*, 4 Tex. Law. Rev. 179; *Railroad v. Adams*, 14 S. W. Rep. 666; *Railroad v. Tisdale*, 11 S. W. Rep. 900; *Platt v. Railroad*, 32 Am. & Eng. R. R. Cases, 530; *Witting v. Railroad*, 14 S. W. Rep. 743; *Davis v. Railroad*, 89 Mo. 340; *Read v. Railroad*, 60 Mo. 199; 44 Ark. 208; *Deming v. Railroad*, 21 Fed. Rep. 25; *Bell v. Railroad*, 6 Mo. App. 368. (2) The court erred in refusing to make the declarations of law requested by defendant. See authorities under point 1, *supra*.

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Sidney F. Andrews, for respondent.

The validity of the terms of the contract of affreightment, or bill of lading, is to be determined by and under the laws of the state of Texas. The contract of carrier was not only made and entered into in the state of Texas, but was also, so far as the defendant is concerned, to be performed there. *Armstrong v. Railroad*, 2 P. & B. (N. B.) 445; *Myric v. Railroad*, 107 U. S. 102; *Moor v. Henry*, 18 Mo. App. 41; *Loomis v. Railroad*, 17 Mo. App. 341; *Wheeler v. Railroad*, 3 Mo. App. 359; *Snider v. Express Co.*, 63 Mo. 376; *Ort v. Railroad*, 31 N. W. Rep. (Minn.) 519; *Heiserman v. Railroad*, 16 Am. & Eng. R. R. Cases, 46. But assuming that the contract of carriage was to be performed in Connecticut, yet the *lex loçi contractus* governs the construction and validity of the contract. Exemption must be lawful where made. *Parks v. Ins. Co.*, 26 Mo. App. 511; *Golson v. Evert*, 52 Mo. 260; *Flato v. Mulhall*, 72 Mo. 522; *Railroad v. Tranic*, 68 Tex. 314; *Railroad v. Moody*, 71 Tex. 615; *Penn. Co. v. Fairchild*, 99 Ill. 260; *Bank v. Shaw*, 61 N. Y. 283; *Hale v. Nav. Co.*, 15 Conn. 539; *Robinson v. Despatch Co.*, 45 Iowa, 470; *Railroad v. Cotton Mills*, 81 Ga. 522. For a late and full discussion of this question, see *Steam Co. v. Ins. Co.*, 129 U. S. 447; *Hartman v. Railroad*, 39 Mo. App. 88. (2) Under the laws of the state of Texas, the stipulation in the bill of lading exempting defendant from loss by fire is void. R. S. Tex., art. 278. (3) Irrespective of said provision in the Revised Statutes of Texas, said fire exemption clause contained in this contract of affreightment is void at common law, because it is unreasonable, unjust and without consideration. *McFadden v. Railroad*, 92 Mo. 343; *Hart v. Railroad*, 112 U. S. 331; *Railroad v. Gilbert*, 12 S. W. Rep. 1018; 2 Am. &. Eng. Ency. of Law, p. 819.

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THOMPSON, J.—This was an action for damages, predicated upon the common-law liability of the defendant as a common carrier, for the destruction by fire of thirty-nine bales of cotton committed to the defendant for transportation as such carrier. The case was tried before the court sitting as a jury, and there was a finding and judgment for the plaintiff, from which the defendant prosecutes this appeal.

The cotton which was destroyed was a part of two different consignments, which were received by the defendant under contracts of carriage hereafter set out, the only difference between the contracts in the two cases being the mark upon the goods and their place of ultimate destination. As the goods which were lost were subjects of these two different bills of lading, the plaintiff drew his petition in two counts as for two different consignments. His petition is not, however, a petition upon the special contract of carriage, but is a petition upon the common-law liability of the defendant as a common carrier. So far as its recitals are material, they are that the cotton was committed by one Roberts to the defendant as a common carrier, at its station at Hillsboro in the state of Texas, consigned in the one case to the order of C. E. Phillips, cashier, Greenville, Connecticut, and in the other case to the same order at Norwich, Connecticut; that "the defendant, as such carrier, received the same, to be by it safely carried for a reasonable consideration to be paid it by the plaintiff, to Galveston, in the state of Texas, to be there delivered to the consignee or a connecting carrier; that the defendant did not safely carry and deliver said fifty bales of cotton as it had agreed to do; but that on the contrary, while said cotton was being carried by defendant, twenty bales thereof, of the value of $882.31, were through and by reason of defendant's carelessness and negligence consumed by fire, and wholly lost to the plaintiff." The second count contains similar averments.

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The answer contains a paragraph appropriate to each count of the petition, averring that the said fifty bales of cotton were received by the defendant at his station at Hillsboro, in the state of Texas, on the twenty-second day of October, 1887, to be transported by it from said station to the town of Greenville in the state of Connecticut, in the one case, and to the town of Norwich in the state of Connecticut, in the other case, under and by virtue of a certain bill of lading, a true copy of which is filed therewith and made a part of the answer. The defendant further avers that said bill of lading, among other things, contains a clause as follows:

"The cotton aforesaid may pass through the custody of several carriers before reaching its destination, and it is understood, as a part of the consideration for which the said cotton is received, that the exceptions from liability made by such carriers, respectively, shall operate in the carriage by them respectively of the said cotton, as though inserted herein at length, and especially that neither of said carriers, or this company, shall be liable for loss or damage of any kind occasioned by delays from any cause, or change of weather, or for loss of damage by *fire*, or for loss or damage on seas, lakes, canals or rivers."

The defendant further avers that the bales of cotton, so received by it, for which this action is brought, "were destroyed by fire." "Therefore, defendant says that, under and by virtue of the provisions of said bill of lading above set out, it is absolved from any liability for the loss and destruction of said cotton by fire, and for failure to deliver the same."

To this answer the plaintiff filed a reply, denying that the defendant undertook or agreed to transport the cotton from Hillsboro, in the state of Texas, to Greenville, in the state of Connecticut, but averring that, under and by virtue of the bill of lading mentioned, the

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defendant agreed to transport the cotton from Hillsboro, and to deliver the same at Galveston in the state of Texas, thus repeating the allegation of his petition. The reply then continued as follows:

"And for a further reply, plaintiff avers that the contract entered into by him with defendant for the transportation of said cotton was made, and was to be wholly performed, by the said defendant within the state of Texas, and the validity thereof is to be determined by and under the laws of the state of Texas; and plaintiff further avers that, by virtue of the laws of the aforesaid state, to-wit, article 278, of the Revised Statutes thereof, which is as follows, viz.: 'Railroad companies and other common carriers of goods, wares and merchandise, for hire, within this state, on land or in boats or vessels on the waters entirely within the body of this state, shall not limit or restrict their liability, as it exists at common law, by any general or special notice, or by inserting exceptions in the bill of lading, or memorandum given upon the receipt of the goods for transportation, or in any manner whatever, and no special agreement made in contravention of the foregoing provisions of this article shall be valid.' Said agreement contained in said bill of lading, set up by defendant as a second defense to plaintiff's first count, is contrary to the provisions thereof, and, therefore, void and of no effect, and does not release defendant from its liability to the plaintiff for the loss of the said cotton, as therein averred by defendant.

"And the plaintiff further denies the validity of the stipulation contained in said bill of lading, pleaded by defendant as exempting it from 'loss by fire,' because, as plaintiff avers, the same is unreasonable, unjust and wholly without consideration."

The reply also contains a second paragraph, applicable to the second paragraph of the answer, which relates to the consignment of the cotton, the ultimate

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destination of which was Norwich, Connecticut, and which is in the same language as that above set out.

The parties agreed upon a statement of facts, which the plaintiff put in evidence as his case. The facts thus agreed upon were: That the plaintiff is the proper party plaintiff; that the thirty-nine bales of cotton sued for were received by the defendant at its station at Hillsboro, Texas, to be transported by it under the bills of lading filed in the case; that the cotton was destroyed by fire on the defendant's cars at or near Galveston, Texas, on the ninth day of November, 1887; that the cotton destroyed was worth $1,736.38; that the Mallory line of steamers was the connecting common carrier; that article 278, of the Revised Statutes of Texas, was offered by the plaintiff, and is correctly set out by the plaintiff in his reply.

The bill of lading appropriate to the first count of the plaintiff's petition was as follows:

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Form 19X-10-90-20M. C. A.

COTTON BILL OF LADING.—"Domestic." No. D. 95.

THE MISSOURI PACIFIC RAILWAY CO.

Hillsboro Station, ...Division, October 22, 1887.

Received from W. H. Roberts, Jr., fifty (50) bales of cotton, in apparent good order, marked and numbered as below, to be transported from Hillsboro, Texas, to Galveston, and delivered to the consignees, or a connecting common carrier.

[ORIGINAL.]

The cotton aforesaid may pass through the custody of several carriers before reaching its destination, and it is understood as a part of the consideration for which the said cotton is received, that the exceptions from liability made by such carriers respectively shall operate in the carriage by them respectively of the said cotton, as though herein inserted at length; and especially that neither of said carriers or this company shall be liable for loss or damage of any kind, occasioned by delays from any cause, or by change of weather, or for loss or damage by fire, or for loss or damage on seas, lakes, canals or rivers. And it is further especially understood, that for all loss or damage occurring in the transit of the said cotton, the legal remedy shall be against the particular carrier only in whose custody the said cotton may actually be at the time of the happening thereof—it being understood that the Missouri Pacific Railway Company, in receiving the said cotton, to be forwarded as aforesaid, assumes no other responsibility for its safety or safe carriage than may be incurred on its own road. All cotton will be subject to necessary bailing, and is received *at owner's risk of wet and dirt*, and carriers will not be accountable for loss in weight arising from unavoidable causes. Freight to be paid on the actual gross weight as ascertained by the company's scales. Claims for damages must be reported by the consignee in writing to the delivering line within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery. If such notice of claim for damage is not thus given, neither this company nor any of the connecting or intermediate carriers shall be liable. *In the event of the loss of property under the provisions of this agreement, the value or cost of the same at the point of shipment shall govern the settlement.*

THE CARRIERS RESERVE TO THEMSELVES THE PRIVILEGE OF COMPRESSING ALL COTTON SIGNED FOR ON THIS BILL OF LADING.

No liability will be assumed for wrong carriage or wrong delivery of cotton that is imperfectly marked.

NOTICE.—This contract is accomplished, and the liability of the companies as common carriers thereunder terminates, on the arrival of the cotton at the station or depot of delivery, and it is understood and agreed that the companies will be liable as warehousemen only thereafter, and unless removed by the consignee from the station or depot of delivery within twenty-four hours after its said arrival, the cotton may be removed and stored by the company at owner's risk and expense in the warehouse of the company or one of its selection, and, after remaining in such warehouse sixty days, the carrier at point of destination may, at its election, advertise in one or more newspapers published in that county for not less than ten days, and sell the cotton either at that point or at such point on its line as it may select, and out of proceeds of such sale pay all charges.

In accepting this contract the shipper, or other agent of the owner of the cotton carried, expressly accepts and agrees to all its stipulations and conditions.

RATES GUARANTEED. To Greenville, Conn. ——cts. per bale. 113 cts. per 100 lbs. Charges advanced, $ ———	Consigned to Order C. E. Phillips, Cashier, Greenville, Conn. Notify H. T. Bennitt, Providence, R. I.

Number of Bales.	MARKS.	TAG NUMBERS.	WEIGHT. Subject to Correction.
Fifty	B. ⟨ 3 ⟩ B.	10,511 10,560 D. M. Morgan, Agent.	Wilbour, Jackson & Co. Oct. 29, 1887. Providence, R. I.

For Shetucket Co.

NOTE.—This Bill of Lading contains the following, among other indorsements, viz.: Delivered on the within Bill of Lading, thirty bales.

GEO. A. HARRIS,
Agent.

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The other bill of lading was the same, in all its recitals, except as to the marks, numbers, weight and place of destination. The place of destination was Norwich, Connecticut, instead of Greenville, Connecticut.

The defendant then offered a mass of evidence tending to show that the cotton was duly transported by the defendant from Hillsboro to Galveston in the state of Texas, where it was tendered day by day for about eleven days to the Mallory line of steamers, the connecting carrier, which line of steamers was unable to receive it in consequence of a glut of freight, overtaxing its means of transportation; that, on or about the eleventh day after the arrival of the cotton at Galveston, the thirty-nine bales sued for were accidentally destroyed by fire, while loaded upon the defendant's cars in its railway stock-yards at or near Galveston; that the glut of cotton in its hands at Galveston was so great that the defendant had no other available place at which to put it; that the defendant's locomotives used in and about the yards were equipped with the most approved spark-arresters; that the cotton was contained in the cars in which it had been originally shipped, which were box cars, closed and sealed; and that the defendant used the best efforts under the circumstances to save it after the fire broke out. But it also appeared from the defendant's evidence that it had no watchman at the stock-yards; that there was a strike among the railway switchmen at the time; that there was also a circus in town; and that a circus usually collects a great many "tramps," who are in the habit of infesting railway yards at night. Nor did the defendant give any evidence tending to show that it notified any party to the bill of lading of the inability of the Mallory line promptly to receive and forward the cotton, and of its consequent delay at Galveston; or that it attempted to ship it by any other line of connecting carriers; nor that it made any attempt, or did any act,

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inconsistent with the conclusion that, at the time the cotton was burned, it held it for transportation, awaiting the convenience of the Mallory line to receive it. Whether the defendant had, under all the circumstances, acted reasonably and diligently, would have been a fair question for a jury under this evidence, if the question had been material.

But, as we shall more fully state hereafter, we are of opinion that the question was not material, for the reason that the bill of lading was an undertaking on the part of the defendant to be performed wholly within the state of Texas; that, by virtue of the statute of Texas, the provision in the bill of lading, by which it attempted to release its common-law liability in case of loss by fire, is invalid; and that, at the time of the loss, it held the cotton as carrier, and not as forwarder, and is hence liable therefor as an insurer under the principles of the common law.

It is perceived that the bill of lading nowhere contains any recital, that the exemptions from common-law liability therein contained are agreed to by the shipper or owner in consideration of any reduced rate of freight or of any other advantage accruing to the shipper or owner; nor did the defendant offer any extrinsic evidence tending to show any consideration to support the agreement. The defendant's evidence, on the other hand, did show that the bill of lading is the same as is used by the defendant for all domestic shipments of cotton.

The court refused a series of instructions, tendered by the defendant, which it is not necessary to set out, and then gave judgment for the plaintiff for the agreed value of the cotton. These rulings of the court indicate that the court took one of two views of the law, applicable to this case: *First.* That, by reason of the statute of Texas, the defendant was, at the time of the destruction of the cotton by fire at Galveston, liable in respect of it as at common law. *Second.* That, if the

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case is not governed by the statute of Texas, the defendant was nevertheless liable as at common law by reason of the want of any consideration to support the agreement for special exemptions from liability.

We shall lay the second possible ground of the court's decision out of view, with the statement that it would require serious attention if the first ground were not decisive of the case. *McFadden v. Railroad*, 92 Mo. 343; *Conover v. Express Co.*, 40 Mo. App. 31; *Doan v. Railroad*, 38 Mo. App. 408; *Lewis v. Railroad*, 3 Q. B. Div. 45; *Louisville, etc., Ry. Co. v. Gilbert*, 88 Tenn. 430; s. c., 12 S. W. Rep. 1018.

We are of opinion that this was not an interstate contract of carriage, but that, under this contract, the obligation of the defendant was to be performed wholly within the state of Texas, and to cease when the defendant should transport the cotton safely and without unreasonable delay to Galveston, in the state of Texas, and there deliver it to a connecting carrier to be continued on its transit. Beyond this, the defendant stood liable only as a guarantor of the amount, which would be charged for freight on the arrival of the cotton at its final destination in the state of Connecticut. The only real ground on which it is claimed that these are through contracts, or interstate bills of lading, is, that they guarantee a through rate of freight to the point of ultimate destination named, in the state of Connecticut. The recital of an ultimate point of destination, and of a consignee beyond the limits of the state, does not, of itself, in any way tend to show that the contract was an interstate contract; because, in every case of the shipment of goods by connecting lines, the bill of lading contains this recital. Nor can such an inference be drawn from the fact that these bills of lading guarantee a through rate of freight to the point of ultimate destination. Undoubtedly, where a carrier makes a through rate of freight to a point of destination beyond the terminus of its own line, this is

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evidence tending to show an undertaking on its part for the entire distance ; but it is not conclusive evidence of such an undertaking. In *Coates v. Express Co.*, 45 Mo. 238, 241, it was held that the receipt of freight by the first carrier for the entire route would go far to prove an undertaking to carry the goods to the point of ultimate destination. But in the subsequent case of *Snider v. Express Co.*, 63 Mo. 376, it was said in substance that the mere fact, that payment is taken by the first carrier for the whole route, would not raise the implication of a contract to carry through, where the written contract limits his liability to his own route. It was so held by the Kansas City Court of Appeals in *Moore v. Henry*, 18 Mo. App. 41, and by this court in *Wheeler v. Railroad*, 3 Mo. App. 359. In the last-named case, this court, speaking through LEWIS, P. J., said: "Plaintiff assumes that the import of each bill of lading was, on its face, a contract to convey the wheat to Atlanta. The circuit court found therein no undertaking for transportation further than Nashville. We think the circuit court was right. The words 'Atlanta, Georgia,' appended to the name of the consignee, could not mean the place of delivery, when a different place of delivery was declared in the plainest terms. The packages were to be transported 'to the company's freight station at Nashville, Tennessee, *there* to be delivered,' etc. We know of no legitimate process, whereby words so unequivocal may be ignored, or perverted to a purpose other than what they express. Certainly not by a mere addition to the consignee's name, without any preposition or auxiliary indication of anything more than personal description. The 'marks,' on the packages, taken by themselves, might serve for the address, indicating the destination of the articles shipped. But the copies of them, in the bill of lading, can serve no purpose other than to identify the packages. It would be strange if they could be

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permitted to contradict the language used in the body of the contract, and so to control the destination."

Applying these principles to the present case, and keeping in view the canon of interpretation that a written instrument must, if possible, be so interpreted as to give effect to all its parts,—we find that the undertaking assumed by the defendant by the express terms of this contract is two-fold: *First.* To transport the cotton from Hillsboro, Texas, to Galveston, and to deliver it to the consignee or to a connecting carrier. *Second.* To guarantee a through rate of freight at $1.13 per one hundred pounds at the place of ultimate destination, which is marked as Greenville, Connecticut, in the one place, and as Norwich, Connecticut, in the other case. These two provisions, taken together, and eliminated from the rest of the contract, are entirely consistent with the conclusion that the defendant undertook to transport the cotton from Hillsboro to Galveston, and there to deliver it to a connecting carrier, which connecting carrier is agreed to be the Mallory line of steamers; and, also, to stand as guarantor that the connecting carrier or carriers would not charge such a rate or such rates of freight as would make the aggregate rate from Hillsboro, Texas, to the respective points of destination in Connecticut exceed $1.13 per hundred pounds. There is in this language no undertaking, whatever, to do anything beyond delivering the cotton to the connecting carrier at Galveston, or stand liable in respect of the cotton beyond discharging the duty of transporting it to Galveston and there delivering it to the connecting carrier.

But, pursuing the language of this contract further, we find that it contains a stipulation which would have entirely precluded the plaintiff, or the consignor, from bringing an action against the defendant in case it has discharged the duty, above assumed, of transporting the cotton to Galveston, and there delivering it to the

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Mallory line of steamers, without damage or unreasonable delay, and in case the cotton had been lost, damaged or destroyed while in the hands of the Mallory line or of some other connecting carrier. The language is as follows: "And it is further especially understood that for all loss or damage occurring in the transit of the said cotton, the legal remedy shall be against the particular carrier only, in whose custody the said cotton may actually be at the time of the happening thereof, it being understood that the Missouri Pacific Railway Company, in receiving the said cotton to be forwarded as aforesaid assumes no other responsibility for its safety or its safe carriage than may be incurred on its own road."

There is also in the contract a stipulation to the effect, that the exemption from liability therein contained shall accrue to the benefit of any connecting line; but that is equally consistent with the conclusion that the defendant had traffic arrangements with contracting lines of carriers, and that it made a bill of lading which might, in case of an action brought against any of the connecting lines, contain provisions beneficial to it and accruing to it. It does not show an agreement to stand under the obligation either of a carrier or a forwarder for the whole distance between Hillsboro, Texas, and the points named in Connecticut, especially in the face of the stipulations in the contract which import the contrary. The contract in question was, therefore, subject to the provisions of the statute of Texas, above set out, and in so far as it contained a special agreement limiting the common-law liability of the defendant as an insurer against loss by fire, it was, under the terms of that statute, invalid.

This justifies the judgment of the circuit court, and renders it unnecessary for us to say more, unless there is something requiring observation in the additional argument of the defendant, that, during the eleven days in which the defendant held this cotton at

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Galveston, awaiting the pleasure of the Mallory line of steamers, it held it as forwarder and not as carrier, and hence is liable only for negligence as an ordinary bailee for hire, notwithstanding the statute of Texas. It is to be perceived that this position is inconsistent with the first position taken by the defendant. The two positions are contradictory. If this was a through contract of carriage from Hillsboro, Texas, to Greenville, Connecticut, then the defendant stood liable as a *carrier* for the whole route, and it could not at its option split up the contract, so as to make itself liable for a part of the route as carrier and for another part as forwarder. But, while this is so, it seems that the defendant is entitled to fall back upon the plaintiff's theory, and to say that, "although that view may be taken by the court; although the court may hold that, by reason of the statute of Texas, we were liable as at common law, yet when we transported the goods to the end of our line at Galveston, and there tendered them to the connecting carrier, and that carrier refused or delayed for an unreasonable length of time to receive them, we thereafter held them not as carriers, but as forwarders, and hence as ordinary bailees for hire, and are, therefore, not liable for their loss except upon proof of negligence.

But this court is of opinion that no circumstances were shown in evidence, which would warrant the conclusion that the relation of the defendant to the goods had shifted from that of a carrier to that of a forwarder at the time of their loss. Whatever difference of judicial opinion there may be as to the relation under which a carrier holds goods after they have arrived at their destination, there seems to be no substantial difference of opinion upon the proposition that, so long as he holds them for delivery to a succeeding carrier, he holds them for *transportation*, and not *for delivery*, and that he hence holds them as carrier and not as an ordinary bailee. And although the connecting carrier refuses or

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unreasonably delays to receive them, the first carrier still holds them as carrier until, by warehousing them, or otherwise, he does some unequivocal act indicative of a purpose to change his office from that of carrier for transportation to that of a mere custodian for safe keeping. So long as he holds the goods on his vehicles of transportation, awaiting the pleasure, the convenience or the necessities of the succeeding carrier, he clearly holds them as carrier, and subject to the liabilities which attach to him in that character. These conclusions are deducible from the following among many other cases: *Goold v. Chapin*, 20 N. Y. 259; s. c., 75 Am. Dec. 398; *McDonald v. Railroad*, 34 N. Y. 497; *Mills v. Railroad*, 45 N. Y. 622; *Hooper v. Railroad*, 27 Wis. 92; *Wood v. Railroad*, 27 Wis. 552; *Conkey v. Railroad*, 31 Wis. 619; *Railroad v. Mfg. Co.*, 16 Wall. (U. S.) 318; *Condon v. Railroad*, 55 Mich. 221.

It results that the judgment of the court is the conclusion of the law upon an undisputed state of facts, and must be affirmed. It is so ordered. All the judges concur.

THOMAS HAND, Plaintiff; R. KOTTERMAN, Respondent, v. THE NELSON DISTILLING COMPANY Appellant.

St. Louis Court of Appeals, November 10, 1891.

Chattel Mortgage: SURRENDER. The voluntary surrender of a chattel mortgage, and of the note thereby secured, by the holder to the mortgagee will operate as a cancellation of the mortgage without a release thereof of record.

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Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

Henry B. Davis, for appellant.

Lubke & Muench, for respondent.

THOMPSON, J.—The Nelson Distilling Company sued out an attachment against Rudolph Kotterman, and caused the same to be levied upon certain personal property belonging to Kotterman, upon which the distilling company had previously held a chattel mortgage. On the day on which the attachment was sued out, the distilling company gave the chattel mortgage and the note which the mortgage secured, to the constable, and directed him to surrender it to Kotterman, the mortgagor, which the constable did. Thereafter, under an arrangement between the parties, the property was sold under the attachment, and Kotterman set up his claim to the proceeds of the sale as being exempt to him under the statute as the head of a family. The constable thereupon brought this interpleader suit in the circuit court, paid the money into court, and was exonerated. Thereafter, the court, upon the evidence embodied in an agreed statement of facts and the exhibits thereto, gave judgment in favor of Kotterman establishing his right of exemption as claimed by him. The agreed statement is as follows:

"The defendant Kotterman is, and was at the time set out in the petition, entitled to all the exemption rights given by statute to a married man, citizen of the state and head of a family; and is entitled to claim and have exempt the fund brought into court here, unless the facts hereinafter stated bar such claim. The judgment obtained by the Nelson Distilling Company is regular and for an amount exceeding the sum deposited

in court here, and the suit was instituted by attachment and sustained on the grounds alleged, being the fraudulent disposition of property; that, on September 6, 1890, the defendant Kotterman gave the Nelson Distilling Company the mortgage and note annexed to this petition, and made part of this evidence; that, on the day the Nelson Distilling Company brought said suit by attachment, it delivered the note and mortgage to the constable with instructions to deliver them to Kotterman, and the constable did so; that the money in question arises from the sale of the property described in the mortgage. Defendant Nelson Distilling Company had, previous to the surrender of said note and mortgage, given defendant Kotterman the receipt hereto attached. The note and mortgage were the consideration of the receipt."

The terms of the chattel mortgage referred to in the agreed statement are not material. The receipt referred to therein is dated September 6, 1890, and is simply a receipt for the sum of $1,135 without other specification.

The case was submitted on this evidence. No instructions were asked or given. The court gave judgment for Kotterman, establishing his right of exemption as already stated. The judgment of the circuit court appears to have merely been the conclusion of law upon the agreed facts. It is agreed that Kotterman was entitled to his exemption in the fund, unless some of the other facts agreed to bar that right. No other facts are agreed to, which have such a tendency. While the agreed case states that the attachment was sustained on the ground of fraudulent *disposition of property*, it nowhere appears that it was sustained on the ground of the *fraudulent sale of the property attached*, so as to bring the case within the points decided by us in *State to use of Nieman v. Koch*, 40 Mo. App. 641. The argument pressed in behalf of the distilling company is, that the chattel mortgage is still existent, and

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that it may claim the fund under the mortgage, to the exclusion of the exemption right of the debtor. But the agreed statement of facts shows that the distilling company have no chattel mortgage against the property of Kotterman. They chose to surrender it, and also the note which it secured, to Kotterman before proceeding by attachment. They had the clear right to do this, and he, of course, had the clear right to accept the surrender. We say "surrender," because the agreed statement used that word in its concluding part, and we must attach the legal import to it. The fact that the mortgage was not canceled of record imports nothing. The object of the record is merely to warn third parties. The mortgage would have been good between the immediate parties without any record. When the distilling company gave up the mortgage to the mortgagor, and also the note secured by the mortgage, and he received them back, the case stood as though the mortgage had never been made, for the purposes of the question here to be decided. That out of the way, the agreed statement shows that Kotterman is entitled to the fund.

The judgment of the circuit court is accordingly affirmed. All the judges concur.

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INDEX.

BY BEN ELI GUTHRIE.

ACCOUNT. See CONTRACT, 4.

1. MECHANICS' LIEN—LIEN ACCOUNTS—SUFFICIENCY OF.—A lien account which fails to show when the material was furnished is insufficient, as it cannot be determined whether the account is one, and that every portion of it should be included in the lien. *Curless & Co. v. Lewis*, 278.

2. ——— DEFINITIONS—JUST AND TRUE ACCOUNT.—"A just and true account" is an itemized account with dates, so that it may be seen from the face thereof that it is one for which a lien may be had. *Ib.*

3. ——— SUFFICIENCY OF ACCOUNT.—An account which is filed to obtain a mechanics' lien, and which contains but a single item in gross and without detail for the entire contract price of a building, is insufficient to sustain the lien as to that item; and, under the rule above stated, the defendant in an action for the enforcement of the lien may contest the validity of the lien in respect to that item, although the account was received in evidence without objection on his part. *Bruns v. Capstick*, 397.

ACTION. See BAILMENTS, 1; DEFENSE, 3.

1. PUBLIC CORPORATIONS—NOT LIABLE FOR REFUSAL TO ACCEPT BID. Although a notice has been published inviting bids for corporate securities, yet the contract is incomplete until the proposal is accepted, and the corporation inviting the proposal is not liable for damages for refusing to accept an offer, even though it be the highest regular offer made: much more so, when the notice reserves the right to reject any and all bids. *Coquard v. School District*, 1.

2. RELEASE PROCURED THROUGH FRAUD.—A plaintiff, who has been induced by fraud or undue influence to release his right of action, may sue upon such right of action without first obtaining the annulment of the release by suit in equity; and, if such release is pleaded as a defense to his action at law, he may in his reply set up the fraud or undue influence in avoidance of it. *Girard v. St. Louis Car-Wheel Co.*, 79.

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3. MISTAKE—INTEREST PAID TO HOLDER OF FORGED NOTE RECOVERABLE—COLLATERAL SECURITY—COSTS.—Plaintiff assumed the payment of a note. The holder pledged the note as collateral to H. & P., and afterwards forged a copy thereof and sold it, with the deed of trust securing it, to A., to whom plaintiff paid interest, thinking it the genuine note. On plaintiff's bill of interpleader against H. & P. and A., with other pleadings properly presenting the issues, the trial court properly found, and *held*,—

(1) Plaintiff had paid A. the interest under mutual mistake, by which he was entitled to recover it back.

(2) H. & P. were the owners of the note and deed of trust, and A. had no interest therein.

(3) That A. pay the costs. *Jourdon v. Harrison & Platt*, 172.

4. INCUMBRANCER'S RIGHT OF ACTION ON ASSUMPTION BY GRANTEE IN DEED.—Where a purchaser accepts and holds a conveyance of real estate, wherein it is recited that he assumes and agrees to pay an incumbrance thereon, he thereby subjects himself to a liability to the holder thereof which may be enforced by a personal action. *Saunders v. McClintoch*, 216.

5. DECEIT—FALSE REPRESENTATION NOT THE ONLY CAUSE OF ACTION —INSTRUCTION.—It is sufficient that the false representation constitute one of a number of material moving causes to the injured party's action, and where two causes or inducements are operative in producing action, one emanating from fraudulent misrepresentations, the other from an independent source, a case of deceit is made out. And an instruction that the misrepresentations must have been the ground on which a transaction took place is error. *Ib.*

6. ——— REPRESENTATION RELATING TO THE FUTURE—DEFENSE. Representations having reference merely to the future, however much relied upon, constitute no ground of action or defense. *Ib.*

7. ——— FRAUD OF GRANTOR IN SECURING GRANTEE'S ASSUMPTION OF INCUMBRANCE—DEFENSE.—The grantee in a deed conveying real estate containing a clause, that he assumes certain notes against the land as part of the consideration, can set up fraud by his grantor in procuring his acceptance of the deed, in a suit on the implied covenant by the holder of the notes at the time the deed was accepted, he being no party to, and having no knowledge of, the fraud. (*Fitzgerald v. Barker*, 96 Mo. 661, *distinguished.*) *Ib.*

8. MONEY HAD AND RECEIVED—INTEREST IN LOTTERY TICKET—CONTRACT—LEGAL, WHERE MADE—EXECUTED CONTRACT.—K., with his own and the money of plaintiff and another, sent to New Orleans and bought tickets in the Louisiana Lottery Company. On the receipt of the tickets at the post office, he, without the

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knowledge of the other two, turned over four of the tickets to defendant. At the drawing one of the tickets so turned over drew a prize, which defendant collected, and refused to pay plaintiff his share. *Held*,—

(1) Plaintiff can maintain his action to recover his share.

(2) The purchase of the tickets was a Louisiana contract and valid, and was not affected by the anti-lottery laws of this state.

(3) When the money came to defendant's hands the contract was executed, and she cannot use the taint of illegality as a shield to protect herself against the claim of plaintiff.

(4) The preceding points are reaffirmed on motion for rehearing. *Hatch v. Hanson*, 323.

ADMINISTRATION.

1. PROBATE COURTS—TRIAL BY JURY.—The provision of the code of civil procedure for the trial of certain issues of fact by jury (R. S. 1889, sec. 2131) has no application to proceedings in the probate court, and in that court there can be no trial by jury in the absence of statutory provision therefor. *Bradley v. Woerner*, 371.

2. ——— CONTESTED CLAIM FOR WIDOW'S ALLOWANCE.—*Held*, accordingly, that, where a claim was made for a widow's allowance in the course of the administration of an estate, and the administrator denied that the claimant was the widow of the decedent, the issue was not triable by jury. *Ib.*

AFFIDAVIT. See APPEAL, 4; CRIMINAL LAW, 1; INFORMATION, 1.

AMENDMENT. See APPEAL, 2; JUSTICES' COURTS, 2.

1. UNLAWFUL DETAINER—VERIFICATION.—Amendments are favored. and should be liberally made in furtherance of justice; and there is no impropriety in allowing an amendment changing the amount of damage in the complaint for unlawful detainer, after the jury is sworn, or even after verdict, and no second verification of the complaint after amendment is required. *Hixon v. Selders*, 275.

2. ——— INSUFFICIENT VERIFICATION OF COMPLAINT—AMENDMENT. A complaint in unlawful detainer which has been insufficiently verified may, after appeal, be amended in the circuit court. *Tegler v. Mitchell*, 349.

APPEAL. See DAMAGES, 3; INJUNCTION, 4.

1. JUSTICES' COURTS—SERVICE OF NOTICE OF APPEAL—OFFICER'S RETURN.—The statute makes it the duty of sheriffs, marshals and constables to serve judicial notices, and it is made specially the duty of the constable to serve notice of appeal from a justice, and, in doing so, he acts in his official capacity under the

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sanction of his official oath and the responsibility of his bond, and his return is *prima facie* evidence of the service in the manner stated therein. *Thomas v. Moore*, 22.

2. ——— NOTICE OF APPEAL—AMENDED TRANSCRIPT—POWER OF JUSTICE.—Though, after service of notice of appeal, the justice without rule of court filed an amended transcript of the judgment which varies the amount of the judgment from that given in the original transcript, which the notice described with sufficient accuracy, yet, in passing upon the sufficiency of the notice. the court cannot consider the amended transcript, as the justice has no power to file such transcript for an appeal without an order of court. *Ib.*

3. ——— ——— DUTY OF COURT.—When the appeal from the judgment of the justice is taken on a day subsequent to its rendition, and no notice thereof was given ten days before the second term of the appellate court thereafter, then the judgment of the justice shall be affirmed at the election of the appellee. In the absence of such notice and the appearance of the appellee the circuit court has no jurisdiction to enter any other judgment than that of affirmance or dismissal of the appeal. *Wolff v. Coffin*, 190.

4. AFFIDAVIT BY AGENT.—It is not essential that an affidavit for an appeal to this court, made by a person other than the appellant, should state that the affiant is the agent of the appellant; the omission of such statement is cured when the agency appears *aliunde*. *Ring v. The Chas. Vogel, etc., Co.*, 374.

5. VALIDITY OF CREATION OF TRIAL COURT.—The question of the legal existence of the trial court cannot be raised on appeal. *State v. Searcy*, 421.

6. CITIES, TOWNS AND VILLAGES—COUNTY COURT.—No appeal lies from the action of the county court incorporating a town under section 977, Revised Statutes, 1889. *Hall v. DeArmond*, 596.

ASSIGNMENT. See CONSTRUCTION, 1.

1. PARTNERSHIP—DEED OF ONE PARTNER FOR THE FIRM.—One partner, by the direction and consent of the other, can, in the name and on behalf of the firm, make a valid deed of assignment for the benefit of the firm creditors. *The Blanke & Bro. Candy Co. v. Walker*, 482.

2. ASSIGNEE CANNOT DEFEND AGAINST ASSIGNOR'S MORTGAGE. An assignee for the benefit of creditors cannot defend against his assignor's mortgage on the ground that it is fraudulent and void as to creditors. (*Following Jacobi v. Jacobi*, 101 Mo. 507.) *Riddle v. Norris*, 512.

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3. ———. *Hughes v. Menefee*, 29 Mo. App. 192, *distinguished. Ib.*

4. VOLUNTARY ASSIGNMENTS FOR THE BENEFIT OF CREDITORS—SUMMARY REMOVAL OF ASSIGNEE.—An assignee under a voluntary assignment for the benefit of creditors may be summarily removed, not only for any of the causes prescribed by the chapter of the Revised Statutes of 1889 concerning such assignments, but also for any cause for which a trustee may be summarily removed under section 3929 of those statutes, which provides for the summary removal of trustees. *State to use v. Hunt*, 676.

5. SUMMARY REMOVAL OF ASSIGNEE OR TRUSTEE—CITATION OF TRUSTEE. *Semble* that, where a trustee has removed out of the state, he may be removed under said section 3929, without citation or previous notice. *Ib.*

6. JUDGMENTS—PRESUMPTIONS.—If such citation or notice were necessary, it would be presumed in absence of proof to the contrary, by reason of the presumption which prevails in favor of the validity of judgments of courts of record having general jurisdiction. *Ib.*

7. VOLUNTARY ASSIGNMENTS FOR THE BENEFIT OF CREDITORS—COMPENSATION OF ASSIGNEE FOR LEGAL SERVICES.—An assignee for the benefit of creditors is not entitled to compensation for legal services rendered by himself, the rule governing trustees in that regard being applicable to him. *Ib.*

8. ——— PLEADING — PARTIES—WAIVER OF OBJECTIONS.—If, upon the removal of such assignee, suit for the assets for which he is accountable is brought by his successor upon his official bond, and the defendants to the action desire to object to the action upon the ground that the creditors of the estate and not the assignee were the proper parties to sue, they must make the objection by demurrer, and will waive it by failing so to make it.

ATTACHMENT. See CHATTEL MORTGAGE, 1; COSTS, 2, 3; EXEMPTIONS, 1; FRAUDULENT CONVEYANCES, 1.

1. POSSESSION—RECORD OF ATTACHMENT.—Though the mortgagee of chattels may not take possession, yet, if before the levy of an attachment the mortgage is filed for record, the lien thereof attaches in preference to the attachment. *Corning & Co. v. Rinehart Medicine Co.*, 16.

2. ——— SELLER'S LIEN—MORTGAGE.—In case the mortgagee had knowledge of the purchase price being unpaid at the time of the creation of his debt, whether he should still be regarded as a purchaser with notice within the purview of the statute, or rather as a lienor taking precedence according to the time of lien, *quære. Ib.*

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3. MALICIOUS ATTACHMENT—PLEADING—PROBABLE CAUSE—PRESUMPTION.—Want of probable cause and malice lie at the foundation of the action for malicious attachment, and constitute its fundamental elements and must both concur, and a petition that does not allege the want of probable cause is fatally insufficient. In the absence of such allegation the presumption is that attachment plaintiff had reasonable cause to bring his suit. *Witascheck v. Glass*, 209.

4. ——— DAMAGES—EVIDENCE—THEORY OF TRIAL.—The admission, over objection, of evidence showing loss and value of time in attending court, money paid for counsel fees, etc., shows that the case was tried on the theory that the action was for malicious attachment, as such damages could only be recovered, where the suit was malicious and without probable cause. *Ib.*

5. TRESPASS—WRONGFUL LEVY OF ATTACHMENT—MEASURE OF DAMAGES.—Where the attachment plaintiff under his writ wrongfully levies on the property of a third person, the measure of damages would be the interest on the value of the goods during the time the owner was deprived of them, unless it appears that injury or deterioration has resulted. *Ib.*

6. PROBABLE CAUSE—DAMAGES.—If a creditor has probable cause to believe himself wronged by his debtor's transfer of his property, he has the right given by law to bring his suit to have the matter judicially determined, subject only, if his claim is adjudged false, to pay the costs of suit and such other damages as are allowed by law when property has been wrongfully seized and detained under the process of attachment. *Ib.*

7. EVIDENCE—MALICE AND OPPRESSION.—A review of the evidence shows that the attachment case was commenced and prosecuted in the utmost good faith and with no circumstance of malice, oppression or wantonness in its conduct. *Ib.*

8. REPLEVIN — EVIDENCE—WRIT OF ATTACHMENT —STRANGER—INSTRUCTION.—In an action of replevin against a sheriff holding under a writ of attachment by a stranger to the attachment proceeding, the sheriff cannot make a *prima facie* case, or question the title of the plaintiff, by producing the attachment writ with his levy thereon and the proof of the debt, but must go further and show that the petition, affidavit and bond, as required by the statutes, were filed in a court of competent jurisdiction before the issue of his writ; and it is error to tell the jury that the production of the writ and the levy thereunder was sufficient to entitle the sheriff to the possession of the goods, unless the plaintiff should, by a preponderance of the evidence, show that he was the owner of the goods at the time of the seizure. *Kendall Boot & Shoe Co. v. Bain*, 581.

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ATTORNEY AND CLIENT.

PRESUMPTION.—There is a presumption that all steps taken by an attorney in the progress of a suit, such as the taking of an appeal, are taken at the direction of the party for whom he appears. And when the presumption is supplemented by the affidavit of the attorney that he has the authority of such party for the action taken by him, it can only be overcome by very satisfactory evidence to the contrary. *Ring v. The Chas. Vogel, etc., Co.*, 374.

ATTORNEY, POWER OF. See CONSTRUCTION, 1.

BAILMENTS.

1. BAILEE—SELLING—TITLE.—A mere bailee is not authorized or empowered by the relation of bailment to convey title against the owner, even though the purchaser honestly believed him to be the true owner. *Hendricks v. Evans*, 313.

2. CONVERSION — MEASURE OF DAMAGES — IMPROVED CONDITION. Where the defendant purchased a team of horses from plaintiff's bailee, and, when plaintiff demanded the same, put the horses out of his possession, the measure of damages is the value at the time of the demand, though the condition of the horses had improved since the purchase. *Ib.*

BILLIARDS. See MUNICIPAL CORPORATIONS, 4.

BILLS AND NOTES. See ACTION, 3; MISTAKE, 1.

1. FRAUD AS A DEFENSE—EVIDENCE IN RELATION TO OTHER NOTES. In an action on a negotiable promissory note by an indorsee, where the defense is fraud, evidence of controversies had, at about the time of the giving of the note in suit, between the payee and other parties about other notes, is inadmissible and its introduction necessarily harmful.—*The First Nat'l Bank v. Stanley*, 440.

2. ——— EVIDENCE OF SIGNATURE OF FIRST INDORSEE TO LETTER. In an action on a negotiable note by the second indorsee where the defense is fraud, it is error to admit in evidence a letter of the indorsee unconnected with the transaction, but admittedly signed by him for the purpose of permitting the jury to compare the signature thereon with the signature of another letter tending to show notice of the fraud on the part of the indorsee and purporting to have been written by him, which he denies; the rule now being that papers not a part of the case, and not relevant, as evidence, to the other issues, are excluded. *Ib.*

3. SIGNING NOTE INSTEAD OF ANOTHER PAPER.—Where one intends to bind himself by some obligation in writing and voluntarily signs his name to what he supposes to be the intended obligation, with full means of ascertaining the true character of the

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instrument before signing, but negligently or by misrepresentation of another signs and delivers a negotiable note in lieu of the instrument intended, he cannot be heard to impeach its validity in the hands of a *bona fide* holder. *Ib.*

4. ——— INNOCENT HOLDER—NOTICE.—Before an indorsee's title to a negotiable note can be impeached on account of notice of fraud, he must have actual notice of the facts which impeach the validity of the paper, and such circumstances as would likely arouse suspicion or put a prudent man on inquiry will not suffice. *Ib.*

5. ——— BURDEN OF PROOF.—The mere possession of an indorsed negotiable note imports *prima facie* that the holder acquired it *bona fide*; but when the maker shows it had its origin in fraud, it is then incumbent on the holder to prove that he received it *bona fide* before maturity and for value. *Ib.*

6. ——— GOOD FAITH OF FIRST INDORSEE.—If the first indorsee in good faith and for value purchases a negotiable note before maturity, and subsequently assigns the same, then his indorsee acquires good title, although he at the time may have had notice of the fraud in the inception of the paper. *Ib.*

7. COLLATERAL SECURITIES—PAYMENT OF SECURED DEBT—NO DEFENSE—INDORSEMENT—OWNER.—K. gave his promissory note to N. who indorsed it to B. to secure him as N.'s indorser at bank. After B.'s death his administrator brought suit against K., the maker. *Held*:—

(1) The payment of the note at bank by N. did not show a failure of consideration so as to constitute a defense.
(2) Such payment only had the operative effect to reinvest the equitable title in N. leaving the naked legal title in plaintiff.
(3) That N.'s indorsement was *prima facie* evidence of ownership in plaintiff, subject to all defenses against the real owner.
(4) That the maker cannot interpose the want of consideration for the transfer as a defense to the suit of the indorsee.
(5) That such want of consideration is a good defense only in an action between the indorsee and his immediate indorser. *Bannister v. Kenton*, 462.

BURDEN OF PROOF. See CONVEYANCES, 5; DEFENSE, 3; EASEMENTS, 4.

BILLS AND NOTES—BURDEN OF PROOF.—The mere possession of an indorsed negotiable note imports *prima facie* that the holder acquired it *bona fide*: but, when the maker shows it had its origin in fraud, it is then incumbent on the holder to prove that he received it *bona fide* before maturity and for value. *First Nat'l Bank v. Stanley*, 440.

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CHATTEL MORTGAGE.

1. FRAUDULENT CONVEYANCES—SELLERS' LIEN—ATTACHMENT—STATUTE OF EXEMPTIONS.—The statute making personal property subject to exemption for the purchase price is one of exemption only, and is not a statute conferring a lien, or establishing priority among creditors; and creditors for the purchase price of personal property, stand on terms of exact equality with general creditors, between whom the prior lien holds as it would, were the statute not in existence, and the vendor cannot follow the property beyond his vendee as against the claim of anyone save a purchaser with notice. If a creditor in good faith takes a mortgage without notice of the unpaid purchase price of the mortgaged goods, he has a superior lien to the subsequent attachment for the purchase price. (*Following Straus v. Sole Leather Co.,*—Mo.—.) *Corning & Co. v. Rinehart Medicine Co.*, 16.

2. POSSESSION—RECORD OF ATTACHMENT.—Though the mortgagee of chattels may not take possession, yet, if before the levy of an attachment the mortgage is filed for record, the lien thereof attaches in preference to the attachment. *Ib.*

3. ——— SELLERS' LIEN—ATTACHMENT.—In case the mortgagee had knowledge of the purchase price being unpaid at the time of the creation of his debt, whether he should still be regarded as a purchaser with notice within the purview of the statute, or rather as a lienor taking precedence according to the time of lien, *quære.* *Ib.*

4. INDORSEMENT OF, ON NOTE GOOD BETWEEN THE PARTIES—AGREEMENT TO MAKE—CONSTRUCTION.—The following indorsement on a note: "As security for the within note I hereby mortgage and pledge to McD., or order, all my art store stock, etc., and agree at any time to make a chattel mortgage of same," is *held* a good mortgage between the parties, and the agreement "to make a chattel mortgage" is *held* to mean a formal mortgage for record to be good against the world. *Riddle v. Norris*, 512.

5. ASSIGNMENT—ASSIGNEE CANNOT DEFEND AGAINST ASSIGNOR'S MORTGAGE.—An assignee for the benefit of creditors cannot defend against his assignor's mortgage on the ground that it is fraudulent and void as to creditors. (*Following Jacobi v. Jacobi*, 101 Mo. 507.) *Ib.*

6. CONSIDERATION SHOWN BY PAROL.—Parol evidence is admissible to show the purpose and intent for which a mortgage was executed, though upon its face it should appear to be for the payment of a specified sum of money. This is the general American doctrine, and is the rule in this state in equity and at law. *Sparks v. Brown*, 529.

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7. Evidence—acts and admissions of grantor.—An assignor or grantor can do no act, nor make any admission subsequently to the assignment or grant, to impeach or impair the title of his assignee or grantee. *Ib.*

8. ——— description — "bay" — "mouse colored"—"brown" —"light brown"—parol.—The pleadings described certain mules as "mouse-colored" and "bay." A chattel mortgage relied upon in evidence described them as "brown" and "light-brown." *Held*, that the descriptions, on their face were different and the terms not interchangeable, and the admission of the mortgage in evidence error, yet it was cured by subsequent parol evidence that these descriptive terms are used interchangeably and synonymously among farmers and stockmen. *Ib.*

9. Fraudulent conduct of mortgagee—second mortgagee—instruction.—A prior mortgagee's mortgage covered all the mortgagor's property. Subsequently to the giving of a second mortgage on part of the same property, the mortgagee permitted the mortgagor to remain in possession and dispose of the property and apply the proceeds to his own use. *Held*, such conduct rendered the prior mortgage fraudulent as to the second mortgagee, and an instruction to that effect is approved. *Ib.*

10. Fraud — knowledge of — instructions without evidence. An instruction should not be given when there is no evidence on which to base it; and, where a mortgagee pursues his legal remedy to obtain possession of the mortgaged property, no inference can arise from that fact alone that it was his intention thereby to aid the mortgagor to defraud a prior mortgagee, without some proof of his knowledge of such fraudulent intention. *Ib.*

11. Surrender.—The surrender of a chattel mortgage and the note secured thereby to the mortgagor operates as a cancellation thereof. *Hand v. Distilling Co.*, 671.

COLLATERAL SECURITIES.

1. Assignment of equity of redemption—purchase—intention—evidence.—A pledgor may sell his equity of redemption subject to the lien of the pledgee, and, if the same transaction shows an intention on the part of the pledgor to make a present and irrevocable transfer of his equity, and assent so to receive it can be inferred on the other side, the transfer will operate in equity as an assignment, if supported by a sufficient consideration; but, if there is anything from which a different intention ought to be inferred, the transaction will not be allowed to have the effect of a transfer. An examination of the facts in this case shows an intention to transfer the note itself in question, and not an equity of redemption therein. *Jordon v. Harrison & Platt*, 172.

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2. **Mistake—interest paid to holder of forged note recoverable—costs.**—Plaintiff assumed the payment of a note. The holder pledged the note as collateral to H. & P., and afterwards forged a copy thereof and sold it, with the deed of trust securing it, to A., to whom plaintiff paid interest, thinking it the genuine note. On plaintiff's bill of interpleader against H. & P. and A., with other pleadings properly presenting the issues, the trial court properly found, and *held*,—

(1) Plaintiff had paid A. the interest under mutual mistake, by which he was entitled to recover it back.

(2) H. & P. were the owners of the note and deed of trust and A. had no interest therein.

(3) That A. pay the costs. *Ib.*

3. Bills and notes—payment of secured debt—no defense—indorsement—owner.—K. gave his promissory note to N. who indorsed it to B. to secure him as N.'s indorser at bank. After B.'s death his administrator brought suit against K., the maker, *Held*:—

(1) The payment of the note at bank by N. did not show a failure of consideration so as to constitute a defense.

(2) Such payment only had the operative effect to reinvest the equitable title in N. leaving the naked legal title in plaintiff.

(3) That N.'s indorsement was *prima facie* evidence of ownership in plaintiff, subject to all defenses against the real owner.

(4) That the maker cannot interpose the want of consideration for the transfer as a defense to the suit of the indorsee.

(5) That such want of consideration is a good defense only in an action between the indorsee and his immediate indorser. *Bannister v. Kenton*, 462.

COMMISSIONS. See Principal and Agent, 4, 5, 6.

COMMON CARRIERS.

1. Liabilities beyond its line—statute.—Under section 944, Revised Statutes, 1889, a railway carrier, receiving goods in this state to be shipped over its own and connecting lines to the point of destination, may stipulate in the contract of shipment against damages to the goods occasioned by the negligence of the connecting carrier. The opinion follows *Dimmitt v. Railroad*, 103 Mo. 433, and discusses prior cases overruled thereby. *Hill v. The Mo. Pac. Ry. Co.*, 517.

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2. WHEN LIABILITY ATTACHES—DELIVERY OF GOODS.—If goods are delivered to a railroad company for transportation without more, the liability of the carrier attaches, and this means an insurance, a responsibility for every loss, save only such as result from the acts of God or the public enemy; but, if the delivery is for storage for a certain or indefinite time, the carrier becomes a mere depository or bailee until the appointed time has expired. *Gregory v. The Wabash Ry. Co.*, 574.

3. SAME.—A delivery to the carrier with the name and address of the assignee marked upon the goods is, in the absence of some directions or agreements otherwise, equivalent to an express direction to transport them to such consignee *at once;* and, on a review of the testimony in this case, it is *held*, there is some evidence tending to prove a delivery for immediate shipment, amply justifying a submission of the case to the jury. *Ib.*

4. COMMON CARRIERS — EXEMPTION FROM COMMON-LAW LIABILITY. It is questioned whether, even in the absence of a prohibitive statute, an agreement in a bill of lading exempting the carrier from his liability at common law is binding, unless it is supported by a special consideration. *Bennitt v. The Mo. Pac. Ry. Co.*, 656.

5. ——— TERMINATION OF CARRIER'S RATE.—A bill of lading for the transportation of goods from Hillsboro, Texas, to Galveston, in the same state, and for the delivery at the latter place to the consignee or a connecting carrier, is not a contract for carriage beyond that place, notwithstanding that it guarantees a through rate of freight to a town in Connecticut, which is named in it as the ultimate point of destination of the goods. *Ib.*

6. ——— TERMINATION OF LIABILITY AS CARRIER.—A carrier holds goods as such, and not as a bailee, while he holds them for delivery to a succeeding carrier; and, although the connecting carrier refuses, or unreasonably delays, to receive them, the first carrier will still hold them as carrier until, by warehousing them, or otherwise, he does some unequivocal act indicative of a purpose to change his office from that of a carrier for transportation to that of a mere custodian for safe keeping. So long as he holds the goods in his vehicles of transportation, awaiting the pleasure, the convenience or the necessities of the succeeding carrier, his liability as carrier continues. *Ib.*

COMMON LAW. See FRAUDULENT CONVEYANCES, 4; JUDGMENT, 8; JUDICIAL NOTICE, 1; PRACTICE, APPELLATE, 19; RAILROADS, 9; SALES, 7.

CONSIDERATION. See CONTRACTS, 3; PLEADING, 4.

CONSTABLES. See APPEALS, 1; JUSTICES' COURTS, 1; NOTICES, 1.

CONSTITUTIONAL LAW. See SLANDER, 4, 5.

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CONSTRUCTION.

1. TRUSTEE OF EXPRESS TRUST—ASSIGNMENT—POWER OF ATTORNEY. An assignment of certain tax bills with a declaration of partnership therein with one T., and a general power of attorney, both set out in the opinion, constitute plaintiff a trustee of an express trust, and authorized him to sue in his own name, without joining with him the person for whose benefit the suit is prosecuted; and the fact that T., the named partner, did not sign or execute any written authority to plaintiff is of no consequence. *Guinotte v. Ridge*, 254.

2. RULES OF, AS TO REPEALS AND INCONSISTENCY OF FORMER AND LATER STATUTES.—In the opinion the following rules of construction are cited *arguendo* and applied:

   (1) An affirmative enactment of a new rule implies a negative of whatever is not included or is different; and, if by the language used a thing is limited to be done in a particular form or manner, it includes a negative that it shall not be done otherwise.

   (2) If two statutes can be read together without contradiction or repugnancy or absurdity or unreasonableness, they should be both read together, and both have effect.

   (3) An intention will not be ascribed to the law-making power to establish conflicting systems upon the same subject. or to have in force provisions of law by which the legislative will may be thwarted and overthrown.

   (4) When the mode in which the municipal power of a corporation upon any given subject can be exercised is prescribed by the charter, that mode must be followed.

   (5) If two inconsistent acts be passed at different times, the last is to be obeyed, and, if obedience cannot be observed without derogating from the first, it must give way.

   (6) Where a statute expresses first a general intent and afterwards an inconsistent particular intent, the latter will be taken as an exception from the former, and both will stand. *Ex Parte Joffee*, 360.

3. JUSTICES' COURTS—CONSTRUCTION OF STATUTE—EVERY LITIGANT HIS OWN LAWYER.—The statute governing practice and proceedings in justices' courts should be construed so as to make it possible for any plain, common-sense citizen to appear there and prosecute or defend an ordinary action. *Lemon v. Lloyd*, 452.

4. RAILROADS—OPEN GATE—STATUTE—COMMON LAW.—A complaint against a railway company alleged that the defendant negligently and wrongfully permitted to be and remain open a certain gate in a railroad fence whereby a certain cow of plaintiff's entered upon defendant's railroad and was killed. The proof showed the gate, some sixty yards from the right of way, had

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been put in for its own use by a coal company, whose land abutted upon the right of way, and there was no fence between the coal land and the right of way. *Held*, plaintiff can predicate no right of recovery against defendant upon its failure to keep the gate of the coal company closed, since the statute imposed no such duty and the common law does not require a railway company to fence its right of way. The theory of an instruction set out in the opinion *held* not warranted by the statute. *Davis v. The Wabash Ry. Co.*, 477.

5. INSURANCE—CONSTRUCTION OF POLICY—PLATE-GLASS FRONT DOORS AND WINDOWS.—A clause in a tornado insurance policy provided that plate-glass in doors and windows, the dimensions whereof are nine square feet or more, was not covered by insurance on the building, but must be separately and specifically insured. *Held*, that a plate-glass front which was immovable, and stationary, is covered by the policy, though the glass therein was of greater dimensions than nine feet. *Hale v. The Springfield, etc., Ins. Co.*, 508.

6. ——— RULE AS TO THE CONSTRUCTION OF POLICY.—If there is a doubt in respect of the meaning of the terms of a clause of an insurance policy, that doubt must be resolved in favor of the interpretation of the assured, although intended otherwise by the insurer. *Ib.*

7. COMMON CARRIERS—LIABILITIES BEYOND ITS LINE—STATUTE. Under section 944, Revised Statutes, 1889, a railway carrier. receiving goods in this state to be shipped over its own and connecting lines to the point of destination, may stipulate in the contract of shipment against damages to the goods occasioned by the negligence of the connecting carrier. The opinion follows *Dimmitt v. Railroad*, 103 Mo. 433, and discusses prior cases overruled thereby. *Hill v. The Mo. Pac. Ry. Co.*, 517.

8. SELLING LIQUOR—AIDERS AND ABETTORS—STATUTE.—If the statute limit the penalty to those who participate, or its terms are general or the offense of minor turpitude, its operation will be limited to those who are more particularly within the reason of the express words of the enactment. *State v. Keith*, 525.

9. TRIAL PRACTICE—SPECIAL FINDING—WHAT IS NOT—DUTY OF COURT. At the conclusion of the evidence, the judge stated his opinion of the facts, and what the evidence conduced to show. and what the judgment should be. *Held*, not to be a special finding. It is no more the duty of the court now, than under the code of 1855, to make a special finding of facts in a cause tried by it, unless one of the parties thereto request it with the view of excepting to the decision of the court upon the question of law or equity arising in the case, in which case the court is required to state in writing the conclusions of facts found separately from the conclusions of law. *Griffith v. The K. C., etc.,Co.*, 539.

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10. LAW AND FACT—CONSTRUCTION OF WRITTEN CONTRACTS.—If an ambiguity in a provision of a written contract cannot be solved by reference to other parts of the contract, and if the surrounding circumstances are the subjects of controversy, the construction of the provision is a question of fact for the jury under proper instructions from the court. *Deutman v. Kilpatrick*, 624.

11. CONSTRUCTION OF AMBIGUOUS CONTRACTS — CONSTRUCTION BY PARTIES.—In such case the interpretation put by the parties themselves upon the contract is of great weight, if not controlling authority. *Ib.*

12. DISPUTED CLAIM—ACCEPTANCE OF TENDER OF PART.—Where a claim is disputed and a debtor tenders a part of it to the creditor in full satisfaction of it, the creditor, if he accepts the tender, is bound by the terms thereof; the creditor cannot accept the tender, and prescribe the terms of acceptance. *Ib.*

13. LAW AND FACT—CONSTRUCTION OF ORAL CONTRACTS.—Where the terms of an oral contract are not admitted, it is for the jury to determine what the contract is. *Watson v. Stromberg*, 630.

CONTRACTS. See ACTION, 8; FRAUD, 1, 2, 3. 4; RELEASE, 2, 3, 4, 5.

1. PUBLIC CORPORATIONS—NOT LIABLE FOR REFUSAL TO ACCEPT BID. Although a notice has been published inviting bids for corporate securities, yet the contract is incomplete until the proposal is accepted, and the corporation inviting the proposal is not liable for damages for refusing to accept an offer, even though it be the highest regular offer made; much more so when the notice reserves the right to reject any and all bids. *Coquard v. School District*, 6.

2. INCUMBRANCER'S RIGHT OF ACTION ON ASSUMPTION BY GRANTEE IN DEED.—Where a purchaser accepts and holds a conveyance of real estate wherein it is recited that he assumes and agrees to pay an incumbrance thereon, he thereby subjects himself to a liability to holder thereof which may be enforced by a personal action. *Saunders v. McClintock*, 216.

3. MODIFICATION—CONSIDERATION—PLEADING —ANSWER—PRACTICE. By failing to deny under oath the execution of the contract declared on in the petition, its execution was admitted; and, if defendant would rely on a new or modified contract subsequently entered into, then he should set it up in his answer. The rescission, change or modification of the original contract could only be accomplished by a new agreement supported by a new consideration. *Merrill v. The Central Trust Co.*, 236.

4. ACCOUNT—QUANTUM MERUIT.—In a suit in a justice's court on an account for services of any kind, it is sufficient proof to authorize a recovery, if it be shown the services were rendered under a special contract to pay so much per day, week or month, or

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a specific sum for the entire service; or, failing in that, even if it only appear there was a contract of employment, but none as to compensation, still the plaintiff ought to be permitted to recover, if he shows by evidence what such services were reasonably worth. *Lemon v. Lloyd,* 452.

5. QUANTUM MERUIT—IMPLIED PROMISE IN THE ABSENCE OF INTENTION—DURESS OR FRAUD.—The law implies from men's conduct and actions contracts and promises as forcible and binding as those made by express words, and such contracts are implied sometimes in the furtherance of the intention, or presumed intention, of the parties, and sometimes in furtherance of justice, without regard to the intention of the parties. And a promise to pay for services rendered or money obtained will be implied against the wrongdoer, who never intended to pay, or intended deceitfully to avoid payment; and whether labor is secured through duress, compulsion or fraud can make no difference. *Hickam v. Hickam,* 496.

6. ——— ——— IGNORANCE OF LAW—MAXIM—FRAUD—SLAVE.—The maxim, *ignorantia legis neminem excusat,* is relaxed in cases of imposition, misrepresentation, undue influence, misplaced confidence and surprise; as if a girl born and raised a slave, ignorant, unable to read, and for a series of years kept under a strict surveillance and in utter ignorance of her emancipation and right to her own labor, and taught to believe she was still the property of her old master, should continue to work for her old master without intention to receive pay on her part, or to give on his part, her ignorance of her legal rights would not defeat her action for such work and labor brought after she learned of the fraudulent suppression. *Ib.*

7. EVIDENCE—VARYING WRITTEN INSTRUMENT—IDENTIFYING SUBJECT-MATTER OF CONTRACT.—While parol evidence cannot be admitted to contradict or vary the terms of a written contract, yet such evidence is competent to identify the subject-matter of the contract, where the instrument is alike applicable to several persons, matters or things, or the terms are vague and general, not definitely identifying the subject-matter of the contract. So, parol evidence is admissible to show that a given note was not embraced in the general terms of an assignment made by a partnership of all its notes and accounts, but that the interest of the partnership in such note had been extinguished before the assignment. *Welsh v. Edmisson,* 282.

8. QUANTUM MERUIT—FRAUD—GROUND OF RECOVERY—INSTRUCTIONS. In an action by such girl against her old master for services, she must recover, if at all, regardless of the intention of one or the other, for the reason, and that alone, that she was induced by the conduct of her old master to render services for him under the belief that she owed him such labor as his slave. Instructions set out in the opinion reviewed and criticised. *Hickam v. Hickam,* 496.

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CONTRIBUTORY NEGLIGENCE. See MASTER AND SERVANT, 1; NEGLIGENCE, 1.

CONVEYANCE. See ACTION, 4; CONTRACT, 2; DEFENSE, 1.

1. MARRIED WOMEN—CONVEYANCE OF WIFE'S REALTY—DEED—ESTOPPEL.—Under the statute, the sole deed of the husband will not answer, even to convey his marital right of possession in his wife's realty. An estoppel *in pais* can never operate to prejudice the rights of the person estopped, except when the sole deed of such person would have a similar operative effect. *Brown v. Miller*, 1.

2. EASEMENTS—BUILDING RESTRICTIONS.—If the owner of several adjoining lots conveys one of them with a restriction as to the manner of building thereon, and subsequently conveys another, and if said restriction was intended for the benefit of the last-mentioned lot, and not merely as a covenant for the benefit of such owner personally, the grantee of said last-mentioned lot and his assigns can enforce said restriction against every owner of said first-mentioned lot, acquiring title under or through said conveyance of the same, and taking with notice, actual or constructive, of the restriction. *Coughlin v. Barker*, 54.

3. SAME.—In order to render the restriction thus enforceable, it is not essential that the conveyance creating it should express the intention to make it for the benefit of the adjoining land, nor need it be reciprocal; that is, it is not necessary that there should be a similar restriction as to the adjoining land; but the absence of such expression of intention, and even more, the absence of such mutuality of restriction, is an evidentiary circumstance tending to show that the restriction was intended by the grantor of the lot subject thereto for his own benefit personally, and not for the benefit of adjoining land retained by him. *Ib.*

4. SAME.—The question, whether such an easement is a personal right, or is to be construed as appurtenant to some other estate, is generally to be determined by the fair interpretation of the grant or reservation creating it, aided, if necessary, by reference to the situation of the property and the surrounding circumstances. *Ib.*

5. SAME—BURDEN OF PROOF.—When a grantee of adjoining land seeks to enforce the restriction, the burden is on him to establish the requisite intention on the part of the grantor of the conveyance by which it is created, and further the requisite notice to the owner of the lot subject to it, against whom the enforcement is sought. And *held* that the terms of the conveyance in the case at bar, when construed with reference to the extrinsic circumstances shown in evidence, did not establish the necessary intention, but only established such an intention conditionally; that is, an intention dependent upon circumstances which never occurred. *Ib.*

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CONVERSION.

1. MEASURE OF DAMAGES—IMPROVED CONDITION.—Where the defendant purchased a team of horses from plaintiff's bailee, and, when plaintiff demanded the same, put the horses out of his possession, the measure of damages is the value at the time of the demand, though the condition of the horses had improved since the purchase. *Hendricks v. Evans*, 313.

2. PRINCIPAL AND AGENT—LIABILITY OF PURCHASER FROM AGENT. One who purchases goods from an agent, knowing, or having good grounds for believing, that in selling them the agent is exceeding his authority, and acting in fraud of his principal, obtains no title, but is guilty of a conversion of the goods. *The White Sewing Machine Co. v. Betting*, 417.

3. TROVER—DEMAND.—When the original taking of goods is tortious, an action for their conversion will lie without any demand for them. *Ib.*

COSTS. See ACTION, 3; MISTAKE, 1.

1. STATUTORY.—The entire subject of costs is a matter of statutory enactment, and the statutes regulating it must be strictly construed; accordingly, an officer or other person claiming costs is not entitled thereto, unless he can point to a statute authorizing the taxation of the same. *Ring v. The Chas. Vogel, etc., Co.*, 374.

2. ATTACHMENT—CLAIMS OF COSTS BY THE SHERIFF.—And, *held*, under the rule thus stated, that a sheriff who levies upon property under a writ of attachment, and causes it to be appraised, is not entitled to the taxation of the expense thereof as costs; nor is he entitled to the taxation of $1 as costs for an application to the court for the sale of the property; but he is probably entitled to fifty cents for taking and returning a forthcoming bond; and the taxation of outlays for labor and clerk hire is permissible, provided that it is shown that the expenditure was necessary for the care of the property, and reasonable. *Ib.*

3. —— —— SHERIFF'S COMMISSIONS.—Property was attached, and the attachment debtor subsequently made an assignment for the benefit of creditors. The assignee gave a forthcoming bond, and, the attachment being sustained, paid to the sheriff then in office, who was the successor of the one who had levied the attachment, a sufficient amount to cover the claim of the attaching creditor and costs, including half commissions. *Held*, that the sheriff who levied the attachment was not entitled to these half commissions. *Ib.*

COUNTY COURTS. See COURTS, 3.

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COURTS.

1. PROBATE--TRIAL BY JURY.--The provision of the code of civil procedure for the trial of certain issues of fact by jury (R. S. 1889, sec. 2131) has no application to proceedings in the probate court, and in that court there can be no trial by jury in the absence of statutory provision therefor. *Bradley v. Woerner*, 371.

2. ——— ——— CONTESTED CLAIM FOR WIDOW'S ALLOWANCE. *Held*, accordingly, that, where a claim was made for a widow's allowance in the course of the administration of an estate, and the administrator denied that the claimant was the widow of the decedent, the issue was not triable by jury. *Ib.*

3. ——— COUNTY COURT RECORDS--PRESUMPTIONS.—It is presumed that the county court orders everything, which appears upon its records, to be recorded therein. *State v. Searcy*, 625.

4. CITIES, TOWNS AND VILLAGES—COUNTY COURT—APPEAL.—No appeal lies from the action of the county court incorporating a town under section 977, Revised Statutes, 1889. *Hall v. De Armond*, 596.

COVENANT FOR TITLE.

INCUMBRANCES—BENEFIT ASSESSMENT FOR STREET IMPROVEMENT —ATTACHMENT OF LIEN--SUBSTANTIAL DAMAGES.—The lien of the assessment of benefits for street improvements, and of the judgment thereunder, attaches as of the date of the approval of the ordinance, and constitutes an incumbrance for which the covenantor must answer to the covenantee who discharges such lien, although the amount of such lien was not ascertained until after the making of the covenant, the covenantee in the meantime having had and enjoyed the property. And he is entitled to recover the actual damages sustained, as the covenant will run with the land and remain alive in the hands of a subsequent grantee who may be compelled to remove the incumbrance; for, then, the substantial breach occurs, and a substantial recovery may be had. *Barnhart v. Hughes*, 318.

CRIMINAL LAW. See DRUGGISTS, 1; LOCAL OPTION, 3.

1. INFORMATION—KNOWLEDGE OF AFFIANT--CURING OF AFFIDAVIT. An affidavit, furnishing the basis for an information by the state's attorney, must be on the actual knowledge of affiant; and the perfect allegation of an information will not cure the vice in the affidavit on which it is based. *State v. Davidson*, 9.

2. CRIMINAL PROCEDURE--SLANDER--JOINDER OF PARTIES.—If several parties all give voice to the same utterance at the same time, or, if all concur in the utterance of one, they may be proceeded against jointly, as it is an entire offense,—one joint act done by all,—and, the more there are that joined in it, the greater is the offense. *State v. Marlier*, 233.

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3. ——— PLEADING—MATTER IN LANGUAGE IN WHICH SPOKEN.—The words alleged to be slanderous should be charged as spoken and in the tongue spoken. They should then, if spoken in a foreign language, be followed by a proper translation; and it is error to set out in the English language words spoken in the French language. *Ib.*

4. DRUGGISTS SELLING LIQUOR—INSUFFICIENT PRESCRIPTION.—A prescription to protect a druggist in the sale of intoxicants thereon must state in substance, if not in words, that such intoxicant is a "necessary remedy;" and the statement that it is "to be used as a medicine" does not substantially comply with the demands of the statute. *State v. Nixdorf*, 494.

5. TRIAL—OTHER OFFENSES.—On the trial of an indictment for abandoning his wife, it is error to advise the jury that defendant had on a prior occasion been indicted for seduction under promise of marriage, etc. *State v. Good*, 515.

6. NO ABETTOR IN SELLING LIQUOR.—In misdemeanors of the class to which liquor-selling belongs, there are no aiders or abettors. *State v. Keith*, 525.

7. AIDERS AND ABETTORS—STATUTE—CONSTRUCTION.—If the statute limit the penalty to those who participate, or its terms are general, or the offense of minor turpitude, its operation will be limited to those who are more particularly within the reason of the express words of the enactment. *Ib.*

8. SELLING LIQUOR—ABETTOR.—Though an agent or servant of the owner becomes liable by selling liquor, yet if defendant was not the owner, agent or servant of the owner, but, merely at his request, set out the glass into which the liquor was poured, and from which it was drunk, he is not guilty of selling. *Ib.*

9. INFORMATION—VERIFICATION OF.—An information in the criminal court of LaFayette county is sufficiently verified by the affidavit of the prosecuting attorney to his best information and belief. *State v. Graham*, 527.

CRIMINAL PROCEDURE. See CRIMINAL LAW, 2, 3.

DAMAGES. See PRINCIPAL AND AGENT, 10; SLANDER, 4, 5, 6, 7.

1. FORCIBLE ENTRY—END OF TERM.—The foreclosure of a mortgage on the leased premises has the effect of ending a tenant's term; and in an action of forcible entry and detainer, in estimating the rents and profits of the tenant, the time calculated should not exceed the tenant's term; and though his term under his lease extends to March, yet, if the foreclosure takes place in the preceding August, his damages should not be calculated beyond that time. *Oakes v. Aldridge*, 11.

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2. INJUNCTIONS—ASSESSMENT OF DAMAGES—COUNSEL FEES.—Upon the dissolution of a temporary restraining order only the necessary counsel fees in obtaining such dissolution can be assessed as damages upon the injunction bond, regardless of the number of counsel actually engaged in the defense. *Neiser v. Thomas*, 47.

3. ——— EFFECT OF APPEAL.—In the case of such dissolution of a temporary restraining order, and of an appeal from the judgment by the plaintiff, the appeal, though accompanied by a *supersedeas* bond, does not keep the restraining order in force. Accordingly, no damages should, in such case, be assessed upon the injunction bond for services of counsel in the appellate court. *Ib.*

4. ATTACHMENT—EVIDENCE—THEORY OF TRIAL.—The admission over objection of evidence showing loss and value of time in attending court, money paid for counsel fees, etc., shows that the case was tried on the theory that the action was for malicious attachment, as such damage could only be recovered, where the suit was malicious and without probable cause. *Witascheck v. Glass*, 209.

5. TRESPASS—WRONGFUL LEVY OF ATTACHMENT—MEASURE OF DAMAGES.—Where the attachment plaintiff under his writ wrongfully levies on the property of a third person, the measure of damages would be the interest on the value of the goods during the time the owner was deprived of them, unless it appears that injury or deterioration has resulted. *Ib.*

6. NUISANCE—FLOODING LAND—PERMANENT DAMAGES.—In cases of nuisance plaintiff cannot recover for damages not sustained when his action is commenced. When the injury inflicted is of a permanent character and goes to the entire value of the estate, the whole injury is suffered at once, and a recovery should be had therefor in a single suit, and no subsequent action can be maintained for the continuance of said injury. But when the wrong done does not involve the entire destruction of the estate, or its beneficial use, but may be apportioned from time to time, separate actions must be brought to recover the damages sustained. *Markt v. Davis*, 272.

7. CONVERSION—MEASURE OF DAMAGES—IMPROVED CONDITION. Where the defendant purchased a team of horses from plaintiff's bailee, and, when plaintiff demanded the same, put the horses out of his possession, the measure of damages is the value at the time of the demand, though the condition of the horses had improved since the purchase. *Hendricks v. Evans*, 313.

8. COVENANT FOR TITLE—INCUMBRANCES—BENEFIT ASSESSMENT FOR STREET IMPROVEMENT—ATTACHMENT OF LIEN—SUBSTANTIAL DAMAGES.—The lien of the assessment of benefits for street improvement, and of the judgment thereunder, attaches as of the date

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of the approval of the ordinance, and constitutes an incumbrance for which the covenantor must answer to the covenantee who discharges such lien, although the amount of such lien was not ascertained until after the making of the covenant, the covenantee in the meantime having had and enjoyed the property. And he is entitled to recover the actual damages sustained, as the covenant will run with the land and remain alive in the hands of a subsequent grantee who may be compelled to remove the incumbrance; for then the substantial breach occurs, and a substantial recovery may be had. *Barnhart v. Hughes*, 318.

9. PRACTICE, TRIAL—REMITTITUR OF DAMAGES.—When the damages are capable of being definitely determined by an exact money standard, a *remittitur* is permissible for the purpose of obviating an excessive assessment of the same by the verdict of the jury. *Schmitz v. The St. Louis, etc., Ry. Co.*, 380.

10. INJURY TO MINOR CHILD—MEASURE OF PARENT'S DAMAGES FOR LOSS OF SERVICES.—In assessing the damages of a father for the loss of the services of his minor child, when the child has been injured, but not killed, through the negligence of the defendant in the action, no deduction should be made for the cost of the support of the child subsequent to the injury. *Ib.*]

11. ——— DAMAGES OF PARENT FOR LOSS OF SERVICES—BURDEN OF PROOF.—If a child, thus injured, is still capable of performing some kind of work, then the father, in suing for the loss of the services of the child, must establish by evidence the probable earning capacity of the child in its injured condition in order to make out a case. *Ib.*

12. PHYSICAL INJURY TO CHILD—FATHER'S MEASURE OF DAMAGES FOR NURSING OF CHILD.—If a child suffers physical injury through the negligence of a railway company, its father is entitled to recover, as part of his damages, reasonable compensation for the services of both his wife and himself in nursing the child. *Ib.*

13. PHYSICAL INJURY TO CHILD—FATHER'S RIGHT OF RECOVERY FOR SERVICES OF CHILD—SUFFICIENCY OF EVIDENCE.—The right of a father to recover for the value of the services of his child, when such child is injured through the negligence of a third person, is predicated upon the relation of master and servant; hence, it is necessary in such case to allege and prove the existence of that relation. But that relation is established by proof that the child was only nine years old; that he lived with his parents at the time of and since the injury; and that he was taken to his home when he was injured, and was nursed by his parents for several months thereafter. *Ib.*

14. SUFFICIENCY OF EVIDENCE.—When damages resulting from the breach of a contract are capable of being estimated by a strict money standard, it is incumbent upon the party claiming them to give evidence of the amount of his damages in dollars and

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cents ; otherwise, his recovery will be confined to nominal damages. But this is not requisite, where his damages are incapable of being reduced to an exact money standard. *Barngrover v. Maack*, 407.

15. LOSS OF CHILD'S SERVICES.—Where a child has been injured through the negligence of another, the father is entitled to recover, as damages, an amount which will fully compensate him for the loss of service and the care of the child, and expense resulting from the injury, for a period not extending beyond the maturity of the child, including surgical attention, care, nursing, medicine and the like. *Buck v. The People's, etc., Co.* 555.

16. REPLEVIN--VALUE AT TIME OF TRIAL.—If the defendant prevails in replevin, the value of the goods should be assessed at the time of trial, and not at the time of caption. *Kendall Boot & Shoe Co. v. Bain.*, 581.

DEBTOR AND CREDITOR. See CONSTRUCTION, 12.

PREFERENCE—HINDERING AND DELAYING OTHERS—INSTRUCTION.—A debtor can prefer a particular creditor by direct payment or assignment, if he does so in paying his just demands and not as a screen to secure property to himself; although the effect of such preference is necessarily to hinder and delay other creditors. An instruction to this effect is approved. *Kendall Boot & Shoe Co. v, Bain*, 581.

DECEIT.

1. FALSE REPRESENTATION NOT THE ONLY CAUSE OF ACTION—INSTRUCTION.—It is sufficient that the false representation constitute one of a number of material moving causes to the injured party's action, and where two causes or inducements are operative in producing action, one emanating from fraudulent misrepresentations, the other from an independent source, a case of deceit is made out. And an instruction that the misrepresentations must have been the ground on which a transaction took place is error. *Saunders v. McClintock*, 216.

2. REPRESENTATION RELATING TO THE FUTURE—DEFENSE.—Representations having reference merely to the future, however much relied upon, constitute no ground of action or defense. *Ib.*

3. FRAUD OF GRANTOR IN SECURING GRANTEE'S ASSUMPTION OF INCUMBRANCE—DEFENSE.—The grantee in a deed conveying real estate containing a clause, that he assumes certain notes against the land as part of the consideration, can set up fraud by his grantor in procuring his acceptance of the deed, in a suit on the implied covenant by the holder of the notes at the time the deed was accepted, he being no party to, and having no knowledge of, the fraud. (*Fitzgerald v. Barker*, 96 Mo. 661, *distinguished.*) *Ib.*

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DEEDS. See CONVEYANCES.

DEFENSE. See BILLS AND NOTES, 1, 2, 3, 4, 5, 6, 7; DRUGGISTS, 1; COLLATERAL SECURITIES, 3; LOCAL OPTION, 3; MARRIED WOMEN, 9; PRINCIPAL AND AGENT, 5, 6.

1. DECEIT—FRAUD OF GRANTOR IN SECURING GRANTEE'S ASSUMPTION OF INCUMBRANCE.—The grantee in a deed conveying real estate containing a clause, that he assumes certain notes against the land as part of the consideration, can set up fraud by his grantor in procuring his acceptance of the deed, in a suit on the implied covenant by the holder of the notes at the time the deed was accepted, he being no party to, and having no knowledge of, the fraud. (*Fitzgerald v. Barker*, 96 Mo. 661, *distinguished.*) *Saunders v. McClintock*, 216.

2. PLEADING—GENERAL DENIAL—EVIDENCE.—The defendant by merely answering the allegations in the petition can only try such questions of fact as are necessary to sustain the plaintiff's case. If he intends to rely upon any matter which goes to defeat or avoid the plaintiff's action, he must set forth in clear and precise terms each substantive fact intended to be relied upon, else he will be precluded from giving evidence of it upon the trial. *Guinotte v. Ridge*, 254.

3. MASTER AND SERVANT—ACTION FOR DISCHARGE—PROCEDURE—DEFENSE—BURDEN OF PROOF.—In an action for the unreasonable discharge of a servant, the plaintiff does not have to plead and prove his sobriety. Drunkenness is matter of defense, and the matter of establishing it is upon the defendant; and the rule as to parties occupying confidential relations does not apply. *Collins v. Glass*, 297.

4. PLEADING—SPECIAL TAX BILL—GENERAL DENIAL—KANSAS CITY CHARTER.—In an action to enforce a special tax bill under the charter of Kansas City, it is sufficient to plead the making and issue of the tax bill sued on, giving the date and contents thereof, and assignment thereof in case of assignment, filing the same, and allege that the party or parties made defendant own or claim to own the land charged, etc. The owner may plead in defense the imperfect character of the work, etc. Plaintiff does not have to allege or prove the work was well and faithfully done; and a general denial does not raise the question as to the character of the workmanship, which must be specifically alleged in the answer. *Ib.*

DEFINITIONS.

1. MALICE.—Malice means that the wrongdoer not only intended to do the act which is ascertained to be wrongful, but that he knew it was wrongful when he did it. *Witascheck v. Glass*, 209.

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2. LANDLORD AND TENANT—SURRENDER.—A surrender is the yielding up the estate to the landlord so that the leasehold becomes extinct by mutual agreement of the parties. It is either by words by which the lessee manifests his intention of yielding up his interest in the premises, or by operation of law, as for instance, where, by consent of both parties, another becomes tenant of the premises, and the landlord collects rent from him. *Buck v. Lewis*, 227.

3. JUST AND TRUE ACCOUNT.—"A just and true account" is an itemized account with dates, so that it may be seen from the face thereof that it is one for which a lien may be had. *Curless & Co. v. Lewis*, 278.

4. "LIKEWISE" IN CHARTER OF KANSAS CITY—CONSTRUCTION.—The word "likewise" in section 1, of chaper 111, of the freeholders' charter of Kansas City means "in like manner, also;" and every grant of power which follows the exception in said section is also and *in like manner* as much subject to its operation as are the powers conferred by the words which precede. *Ex Parte Joffee*, 360.

5. INSURANCE—JAPANESE VASE INCLUDED IN HOUSEHOLD FURNITURE. A Japanese vase is included in "household furniture, useful and ornamental." *Browne v. Hartford Ins. Co.*, 473.

6. WINDOWS.—A window is an aperture or opening in the wall of a building for the admission of light and air to the interior, and to enable those within to look out. *Hale v. Springfield, etc., Ins. Co.*, 508.

7. NEGLIGENCE—REASONABLE CARE.—Reasonable care and prudence imply the converse of negligence; and, if reasonable care and prudence would have prevented the injury, then defendant is guilty of negligence. *Buck v. The People's, etc., Co.*, 555.

DELIVERY. See COMMON CARRIERS, 2, 3; SALES, 4, 5, 6.

DEMAND. See CONVERSION, 3.

DEPOSITIONS. See WITNESSES, 1.

1. STIPULATION—DEPOSITIONS.—A stipulation filed in this cause was to the effect, that a deposition taken in another action might be read in this cause with the same force and effect as if taken upon proper notice. *Held*, that this stipulation waived no right of either party in reference to the deposition, except the right of objection for want of notice, and did not entitle either party to read the deposition against the objection of the other party, if the witness was present at the trial. *Schmitz v. The St. Louis, etc., Ry. Co.*, 380.

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2. WHO MAY READ—WHOSE PROPERTY.—A deposition taken and filed in the cause is the common property of the litigants therein, and either is entitled to use it, and a party putting interrogations on cross-examination in the deposition of a witness may decline to read the same with the answers thereto, but, if he do, then the other party may read them. *Watson v. Race*, 546.

DRAMSHOPS. See LOCAL OPTION, 1, 2, 3.

1. FREEHOLDERS' CHARTER OF KANSAS CITY—PROVISIONS OF SELF-EXECUTIVE.—The freeholders' charter of Kansas City of 1889 requires that an applicant for a dramshop license secure the indorsement on his application of the board of police commissioners that he has proved himself a person of good moral character, and, whenever such application so indorsed shall be presented to the city auditor, he shall issue a license to such applicant. Said charter also provides that ordinances, etc., in force at the time this charter takes effect, and not inconsistent with the provisions thereof, shall remain in force, etc. These provisions are self-executive, requiring no provisions of the common council to render them efficacious. *Ex Parte Joffee*, 360.

2. ——— DRAMSHOP ORDINANCE OF 1888—REPEAL.—The dramshop ordinance of 1888, as it appears in the revised ordinances of that year, being inconsistent with the freeholders' charter, as the prerequisites of the granting of a dramshop license, is in so far repealed by said charter. *Ib.*

3. ——— BOARD OF POLICE COMMISSIONERS.—The freeholders charter has conferred upon the board of police commissioners full and exclusive power over the subject-matter of the grant and revocation of city dramshop licenses, and the propriety of the issue of such license in any given case is a matter solely within the discretion of the board; and it has likewise, as shown by the history of its adoption, left with the mayor and common council the power to fix the amount of the charge for such license. *Ib.*

4. DEFINITIONS—"LIKEWISE" IN CHARTER OF KANSAS CITY—CONSTRUCTION—The word "likewise" in section 1, of chapter 111, of the freeholders' charter of Kansas City, means "in like manner, also;" and every grant of power which follows the exception in said section is also and *in like manner* as much subject to its operation as are the powers conferred by the words which precede. *Ib.*

5. CONSTRUCTION—RULES OF, AS TO REPEALS AND INCONSISTENCY OF FORMER AND LATER STATUTES.—In the opinion the following rules of construction are cited *arguendo* and applied:

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(1) An affirmative enactment of a new rule implies a negative of whatever is not included or is different; and, if by the language used, a thing is limited to be done in a particular form or manner, it includes a negative that it shall not be done otherwise.

(2) If two statutes can be read together without contradiction or repugnancy or absurdity or unreasonableness, they should be both read together and both have effect.

(3) An intention will not be ascribed to the law-making power to establish conflicting systems upon the same subject, or to have in force provisions of law by which the legislative will may be thwarted and overthrown.

(4) When the mode in which the municipal power of a corporation upon any given subject can be exercised is prescribed by the charter, that mode must be followed.

(5) If two inconsistent acts be passed at different times, the last is to be obeyed, and, if obedience cannot be observed without derogating from the first, it must give way.

(6) Where a statute expresses, first, a general intent, and afterwards an inconsistent particular intent, the latter will be taken as an exception from the former, and both will stand. *Ib.*

DRIVER. See RAILROADS, 13.

DRUGGISTS.

1. LOCAL OPTION—SALES BY DRUGGISTS.—A person who is indicted for a violation of the local-option law, and defends on the ground that he is a licensed druggist and as such made the sale of liquor for which he is indicted, must bring his sale within the provisions of the law relating to such sales by druggists, and, where the sale is for medicinal purposes, must, therefore, show a physician's prescription. *State v. Searcy*, 421.

2. CRIMINAL LAW—DRUGGISTS SELLING LIQUOR—INSUFFICIENT PRESCRIPTION.—A prescription to protect a druggist in the sale of intoxicants thereon must state in substance, if not in words, that such intoxicant is a "necessary remedy," and the statement that it is "to be used as a medicine" does not substantially comply with the demands of the statute. *State v. Nixdorf*, 494.

EASEMENTS.

1. BUILDING RESTRICTIONS.—If the owner of several adjoining lots conveys one of them with a restriction as to the manner of building thereon, and subsequently conveys another, and if said restriction was intended for the benefit of said last-mentioned lot, and not merely as a covenant for the benefit of such owner

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personally, the grantee of said last-mentioned lot and his assigns can enforce said restriction against every owner of said first-mentioned lot, acquiring title under or through said conveyance of the same, and taking with notice, actual or constructive, of the restriction. *Coughlin v. Barker*, 54.

2. SAME.—In order to render the restriction thus enforceable, it is not essential that the conveyance creating it should express the intention to make it for the benefit of the adjoining land, nor need it be reciprocal; that is, it is not necessary that there should be a similar restriction as to the adjoining land; but the absence of such expression of intention, and even more the absence of such mutuality of restriction, is an evidentiary circumstance tending to show that the restriction was intended by the grantor of the lot subject thereto for his own benefit personally and not for the benefit of adjoining land retained by him. *Ib.*

3. SAME.—The question whether such an easement is a personal right, or is to be construed as appurtenant to some other estate, is generally to be determined by the fair interpretation of the grant or reservation creating it, aided if necessary by reference to the situation of the property and the surrounding circumstances. *Ib.*

4. SAME—BURDEN OF PROOF.—When a grantee of adjoining land seeks to enforce the restriction, the burden is on him to establish the requisite intention on the part of the grantor of the conveyance by which it is created, and further the requisite notice to the owner of the lot subject to it, against whom the enforcement is sought. And *held* that the terms of the conveyance in the case at bar, when construed with reference to the extrinsic circumstances shown in evidence, did not establish the necessary intention, but only established such an intention conditionally; that is, an intention dependent upon circumstances which never occurred. *Ib.*

ELECTIONS.

CERTIFICATE OF ELECTION.—*Held, arguendo*, that in the case of a general election, the county clerk is required to take to his assistance two justices of the peace, or two judges of the county court, only for the purpose of aiding him in examining and casting up the votes given to each candidate, and that these two justices or judges are not required to sign the certificate of election given to the candidate having the highest number of votes. *State v. Searcy*, 421.

EJECTMENT.

WRIT AGAINST THIRD PARTIES.—Where a tenant in possession is not made a party to an ejectment proceeding, his dispossession by force of the writ of restitution in such proceeding is unlawful. *Oakes v. Aldridge*, 11.

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ESTOPPEL. See WAIVER, 1.

1. MARRIED WOMEN—CONVEYANCE OF WIFE'S REALTY—DEED. Under the statute, the sole deed of the husband will not answer even to convey his marital right of possession in his wife's realty. An estoppel *in pais* can never operate to prejudice the rights of the person estopped, except when the sole deed of such person would have a similar operative effect. *Brown v. Miller*, 1.

2. PRINCIPAL AND SURETY—DISCHARGE.—A creditor, who on being informed by one of his debtors known to be a surety, that the debt can be made of the principal, and that he is unwilling to remain longer liable, replied that the debt was about to be secured, and, if security was given, the time would be extended; but, if not given, suit would be brought, and the surety should take no further action in the matter, and later informed the surety the matter was arranged, is estopped to further hold the surety. *Triplett v. Randolph*, 569.

EVIDENCE. See INJUNCTION, 1; JUDICIAL NOTICE, 1; PRACTICE, APPELLATE, 5, 6; PRINCIPAL AND AGENT, 11; SLANDER, 8; VERDICT, 1, 2.

1. TESTIMONY OF EXPERTS.—The testimony of experts is at most advisory, and its weight is to be determined by the experience and knowledge, however acquired, which the trier of the facts has of the subject-matter under consideration. *The W. U. Tel. Co. v. Guernsey, etc., Co.*, 120.

2. SALES—WARRANTY OF TITLE—CONVERSATION.—Plaintiff sued upon an implied warranty of title in the sale of a typewriter; defendant's contention was that it had given an option on the typewriter to A. who, before the time expired, sold it to plaintiff. It was undisputed that plaintiff gave his check to A., and, on his indorsement thereof to defendant, the latter paid him the difference between its price to him and his price to plaintiff. *Held*, the conversations between A. and defendant's agent—all the verbal acts of the parties connected with the transaction—should have been admitted in evidence to enable the jury to determine the question as to whom the sale was made by the defendant. *Clark v. The People's Collateral Loan Co.*, 248.

3. PLEADING—GENERAL DENIAL.—The defendant by merely answering the allegations in the petition can only try such questions of fact as are necessary to sustain the plaintiff's case. If he intends to rely upon any matter which goes to defeat or avoid the plaintiff's action, he must set forth in clear and precise terms each substantive fact intended to be relied upon, else he will be precluded from giving evidence of it upon the trial. *Guinotte v. Ridge*, 254.

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4. VARYING WRITTEN INSTRUMENT—IDENTIFYING SUBJECT-MATTER OF CONTRACT.—While parol evidence cannot be admitted to contradict or vary the terms of a written contract, yet such evidence is competent to identify the subject-matter of the contract, where the instrument is alike applicable to several persons, matters or things, or the terms are vague and general, not definitely identifying the subject-matter of the contract. So, parol evidence is admissible to show that a given note was not embraced in the general terms of an assignment made by a partnership of all its notes and accounts, but that the interest of the partnership in such note had been extinguished before the assignment. *Welsh v. Edmisson*, 282.

5. ASSIGNMENT—LIST OF NOTES—PAROL TO CONNECT.—Although an assignment of notes and accounts, and a list of notes, do not refer to one another, it may be shown by parol evidence that the latter was made contemporaneously with the former as a part of it, and it may be introduced to identify the subject-matter of the assignment. *Ib.*

6. FOREIGN STATUTE—PLEADING.—When the action is not based on a foreign statute, it is unnecessary to plead it in order to introduce it in evidence. *Hatch v. Hanson*, 323.

7. BILL AND NOTES—FRAUD—EVIDENCE OF SIGNATURE OF FIRST INDORSEE TO LETTER.—In an action on a negotiable note by the second indorsee where the defense is fraud, it is error to admit in evidence a letter of the first indorsee unconnected with the transaction, but admittedly signed by him for the purpose of permitting the jury to compare the signature thereon with the signature of another letter tending to show notice of the fraud on the part of the indorsee and purporting to have been written by him, which he denies; the rule now being that papers not a part of the case, and not relevant, as evidence, to the other issues are excluded. *First Nat. Bank v. Stanley*, 440.

8. PRINCIPAL AND AGENT—AGENT GIVING PURCHASER PART OF COMMISSION NO DEFENSE.—The fact that the agent agreed to give the purchaser a part of his commission if he would close the trade cannot injure the principal, and is not admissible in evidence to defeat an action for the agent's commissions. *Lemon v. Lloyd* 452.

9. ——— COMMISSIONS—PERFECTING TITLE—DEFENSE.—The mere fact, that the purchaser produced by the agent at the time of making the contract of purchase knew that there were some proceedings in the probate court required to perfect the title, is not admissible in evidence, unless followed by the further offer to show what the proceedings were and the time required to secure them, so that the jury could determine whether defendant had perfected the title in a reasonable time; and such fact

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cannot defeat the agent's action for his commissions, where the purchaser produced was able and willing and was accepted and contracted with by the principal. *Ib.*

10. PUBLIC ROADS—ORDER OPENING—EVIDENCE OF IRREGULARITIES. If a road has been opened by an order of the county court, and a plat thereof has been filed in the clerk's office, and such road has been used for ten years or more, then it is a public road; and evidence to show irregularities in the court proceedings to open it are inadmissible. *Harper v. Moore*, 470.

11. INSURANCE—EVIDENCE OF NOTICE HARMLESS ERROR—FRAUD. Where there is no objection by the insurer as to the claim for loss except upon grounds of fraud, the admission in evidence of a conversation with defendant's local agent as to notice of loss, if erroneous, is harmless. *Browne v. Hartford Fire Ins. Co.*, 473.

12. ——— VALUES—PROOF OF LOSS.—While the values stated in the proofs of loss are not evidence of such values, yet an instruction so declaring ought not to be so worded that the jury might well understand that they were directed not to consider plaintiff's estimates of values in his testimony. *Ib.*

13. CHATTEL MORTGAGES—CONSIDERATION SHOWN BY PAROL.—Parol evidence is admissible to show the purpose and intent for which a mortgage was executed, though upon its face it should appear to be for the payment of a specified sum of money. This is the general American doctrine, and is the rule in this state in equity and at law. *Sparks v. Brown*, 529.

14. ACTS AND ADMISSIONS OF GRANTOR.—An assignor or grantor can do no act, nor make any admission subsequently to the assignment or grant, to impeach or impair the title of his assignee or grantee. *Ib.*

15. ——— DESCRIPTION—"BAY"—"MOUSE-COLORED"—"BROWN"—"LIGHT BROWN"—PAROL.—The pleadings described certain mules as "mouse-colored" and "bay." A chattel mortgage relied upon in evidence described them as "brown" and "light brown." *Held*, that the descriptions, on their face, were different and the terms not interchangeable, and the admission of the mortgage in evidence error, yet it was cured by subsequent parol evidence that these descriptive terms are used interchangeably and synonymously among farmers and stockmen. *Ib.*

16. PRINCIPAL AND AGENT—DECLARATIONS OF AGENT.—A party cannot be bound by any statement or admission of a person not his agent in the matter referred to at the time; and, while the fact that one had been acting as agent of defendant is competent to show a general agency, it is incompetent if it is sought thereby to show agency in another matter with a view to infer such agency in the matter in controversy. *Watson v. Race*, 546.

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17. DEPOSITION—WHO MAY READ—WHOSE PROPERTY.—A deposition taken and filed in the cause is the common property of the litigants therein, and either is entitled to use it, and a party putting interrogations on cross-examination in the deposition of a witness may decline to read the same with the answers thereto, but, if he do, the other party may read them. *Ib.*

18. POSSESSIONS—OPINION OF WITNESS.—In an action of replevin brought by a third party against a sheriff holding goods under a writ of attachment, it is error to permit a witness to testify that, at the levy of the writ, the attachment defendant was in possession of the goods attached, when the undisputed evidence shows that the possession was at that time a mixed question of law and fact, upon which the opinion of the witness did not throw any light. *Kendall Boot & Shoe Co. v. Bain*, 581.

19. OPINIONS OF WITNESSES.—The competency of a witness' opinion rests upon two necessary conditions: That the subject-matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time; that the facts upon which the witness is called to express an opinion are such as men in general are capable of comprehending and understanding. *Ib.*

20. REPLEVIN—WRIT OF ATTACHMENT—STRANGER—INSTRUCTION.—In an action of replevin against a sheriff holding under a writ of attachment by a stranger to the attachment proceeding, the sheriff cannot make a *prima facie* case or question the title of the plaintiff by producing the attachment writ with his levy thereon and the proof of the debt, but must go further and show that the petition, affidavit and bond, as required by the statutes, were filed in a court of competent jurisdiction before the issue of his writ; and it is error to tell the jury that the production of the writ and the levy thereunder was sufficient to entitle the sheriff to the possession of the goods, unless the plaintiff should, by a preponderance of the evidence, show that he was the owner of the goods at the time of the seizure. *Ib.*

EXEMPTIONS.

1. FRAUDULENT CONVEYANCES—SELLER'S LIEN—MORTGAGE—ATTACHMENT—STATUTE OF EXEMPTIONS.—The statute making personal property subject to exemption for the purchase price is one of exemption only, and is not a statute conferring a lien, or establishing priority among creditors; and creditors for the purchase price of personal property stand on terms of exact equality with general creditors, between whom the prior lien holds as it would, were the statute not in existence, and the vendor cannot follow the property beyond his vendee as against the claim of anyone save a purchaser with notice. If a creditor in good faith, takes a mortgage without notice of the unpaid purchase

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price of the mortgaged goods, he has a superior lien to the subsequent attachment for the purchase price. (*Following Straus v. Sole Leather Co.*, —— Mo. ——.) *Corning & Co. v. Rinehart Medicine Co.*, 16.

2. —— SELLER'S LIEN—MORTGAGE—ATTACHMENT.—In case the mortgagee had knowledge of the purchase price being unpaid at the time of the creation of his debt, whether he should still be regarded as a purchaser with notice within the purview of the *statute*, or rather as a lienor taking precedence according to the time of lien, *quære. Ib.*

3. EXECUTIONS — HEAD OF A FAMILY.—While a man, who lives with and supports his widowed mother and his sisters, is ordinarily deemed to be the head of a family within the purview of the statute providing for exemptions from the levy of process on property, still he is not to be so considered, when the claim of exemption is invoked against an execution issued under a judgment which his wife has obtained against him for maintenance, since the allowance of this claim in such a case would be a perversion of the purpose of the statute. *Spengler v. Kaufman*, 644.

FARE. See RAILROADS, 13.

FELLOW SERVANTS. See MASTER AND SERVANT, 1, 2, 3; NEGLIGENCE, 1, 2, 3.

FENCES AND INCLOSURES. See RAILROADS, 9.

FLOODING LAND. See DAMAGES, 1; NUISANCES, 1.

FORCIBLE ENTRY AND DETAINER.

1. ACTUAL FORCE.—It is sufficient upon which to base an action of forcible entry, that the entry be made against the will of him who is in peaceable possession; there need be no actual force. *Oakes v. Aldridge*, 11.

2. DAMAGES—END OF TERM.—The foreclosure of a mortgage on the leased premises, has the effect of ending a tenant's term; and in action of forcible entry and detainer, in estimating the rents and profits of the tenant, the time calculated should not exceed the tenant's term; and though his term under his lease extends to March, yet, if the foreclosure takes place in the preceding August, his damages should not be calculated beyond that time. *Ib.*

3. AMENDMENTS — UNLAWFUL DETAINER— VERIFICATION.—Amendments are favored, and should be liberally made in furtherance of justice; and there is no impropriety in allowing an amendment changing the amount of damage in the complaint for unlawful detainer, after the jury is sworn, or even after verdict, and no second verification of the complaint after amendment is required. *Hixon v. Selders*, 275.

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4. **Complaint—damages.—The statute does not require the complaint in an action of forcible or unlawful entry and detainer to allege a specific claim for damages.** ***Ib.***

5. **Unlawful detainer—insufficient verification of complaint—amendment.—A complaint in unlawful detainer which has been insufficiently verified may, after appeal, be amended in the circuit court.** ***Tegler v. Mitchell,*** **349.**

6. **—— complaint—land in state.—A complaint in unlawful detainer which fails to show that the land is in the state of Missouri is insufficient and confers no jurisdiction.** ***Ib.***

FORGERY. See Action, 8; Mistake, 1.

FRAUD. See Action, 7; Bills and Notes, 1, 2, 3, 4, 5, 6; Deceit, 1, 2, 3; Defense, 1.

1. Release—sufficiency of evidence of fraud.—Such a release stands upon the footing of a compromise, and should be upheld when fairly made. It should not be vacated for fraud in an action at law, unless the evidence of the fraud, if believed, and the circumstances attending its execution, are such as would warrant a chancellor in setting it aside. And *held* that the evidence in this cause was sufficient under this rule. *Girard v. St. Louis Car Wheel Co.*, 79.

2. —— unusual provisions in a release.—An unusual provision in an instrument, whereby the draftsman of the instrument obtains an advantage over the other party, excites suspicion of a fraudulent motive. This rule is applied herein to a provision in the release of a cause of action, stating that the party making the release agreed to release "deliberately, of his own free will, and without any undue influence from anyone." *Ib.*

3. —— rescission of contract—restoration of benefits received.—If a party to a contract seeks to have it annulled because he was induced to enter into it by fraud, he must ordinarily restore to the other party the consideration received by him, under it: but he is not bound to restore such consideration, where the contract consists of the release of a cause of action on his part, and the consideration received was less than what is due him for such cause of action. *Ib.*

4. —— ——. If a party to a contract does not labor under a disability or infirmity, his mere failure, through his own fault or neglect, to read it or inform himself of its contents, is not sufficient to annul it or overcome its legal effect as to him. *Ib.*

5. Rescission of contract.—Where a contract has been obtained by fraud, the defrauded party may rescind it without the aid of any court, if he acts promptly after the discovery of the fraud; but, in such case, he must return, or offer to return, whatever of value he has received on account of such contract. And this rule is applicable to the compromise and release of a disputed claim for less than its amount. *Ib.* [*Per Biggs, J., dissenting.*]

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6. QUANTUM MERUIT—IMPLIED PROMISE IN THE ABSENCE OF INTENSION—DURESS.—The law implies from men's conduct and actions contracts and promises as forcible and binding as those made by express words, and *such contracts* are implied sometimes in the furtherance of the intention, or presumed intention, of the parties, and sometimes in furtherance of justice, without regard to the intention of the parties. And a promise to pay for services rendered or money obtained will be implied against the wrongdoer, who never intended to pay, or intended deceitfully to avoid payment; and whether labor is security through duress, compulsion or fraud can make no difference. *Hickam v. Hickam*, 496.

7. ——— ——— IGNORANCE OF LAW—MAXIM—FRAUD—SLAVE. The maxim, *ignorantia legis neminem excusat*, is relaxed in cases of imposition, misrepresentation, undue influence, misplaced confidence and surprise; as if a girl born and raised a slave, ignorant, unable to read, and for a series of years kept under a strict surveillance and in utter ignorance of her emancipation and right to her own labor, and taught to believe she was still the property of her old master, should continue to work for her old master without intention to receive pay on her part, or to give on his part, her ignorance of her legal rights would not defeat her action for such work and labor brought after she learned of the fraudulent suppression. *Ib.*

8. ——— LIMITATION.—Where a girl, born a slave, has by the fraudulent conduct of her old master been induced to continue to labor for him in ignorance of her rights for twenty-four years after her emancipation, the cause of action for such services, if any there is, accrues on the discovery of the fraud, her claim is an entirety for the whole, and the five years' limitation does not apply to bar all but the last five years' services. *Ib.*

9. CHATTEL MORTGAGE—FRAUDULENT CONDUCT OF THE MORTGAGEE—SECOND MORTGAGEE—INSTRUCTION.—A prior mortgagee's mortgage covered all the mortgagor's property. Subsequently to the giving of a second mortgage on part of the same property, the mortgagee permitted the mortgagor to remain in possession and dispose of the property and apply the proceeds to his own use. *Held*, such conduct rendered the prior mortgage fraudulent as to the second mortgagee, and an instruction to that effect is approved. *Sparks v. Brown*, 529.

10. FRAUD—SUFFICIENCY OF EVIDENCE.—*Held*, that, while the verdict of a jury on an issue of fraud cannot be predicated on mere conjecture or suspicion, still very slight circumstances will warrant the submission of the issue to the jury in a case like the one at bar—it being one wherein a husband, in order to defeat the levy of an execution issued on a judgment which his wife

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had obtained against him for maintenance, required his employers to pay him his wages in advance, and his employers acquiesced in his demand with notice of its purpose, but claimed that they did so because they had need for his services, and feared that he would otherwise quit their employ, as he had threatened to do. *Spengler v. Kaufman*, 644.

FRAUDULENT CONVEYANCES.

1. SELLER'S LIEN—MORTGAGE—ATTACHMENT—STATUTE OF EXEMPTIONS.—The statute making personal property subject to exemption for the purchase price is one of exemption only, and is not a statute conferring a lien, or establishing priority among creditors; and creditors for the purchase price of personal property, stand on terms of exact equality with general creditors, between whom the prior lien holds as it would, were the statute not in existence, and the vendor cannot follow the property beyond his vendee as against the claim of anyone save a purchaser with notice. If a creditor, in good faith, takes a mortgage without notice of the unpaid purchase price of the mortgaged goods, he has a prior lien to the subsequent attachment for the purchase price. (*Following Straus v. Sole Leather Co.*, — Mo. —.) *Corning & Co. v. Rinehart Medicine Co.*, 16.

2. POSSESSION—PRACTICE—DEMURRER TO EVIDENCE.—Though a demurrer to an interpleader's evidence might have been sustained, yet, if, as in this case, the subsequent evidence established the interpleader's possession of the attached goods, the finding must be for the interpleader, since possession made a *prima facie* case of ownership which was otherwise uncontradicted. *Baer, Seasongood & Co. v. Groves*, 245.

3. DEBTOR AND CREDITOR—PREFERENCE—HINDERING AND DELAYING OTHERS—INSTRUCTION.—A debtor can prefer a particular creditor by direct payment or assignment, if he does so in paying his just demands and not as a screen to secure property to himself; although the effect of such preference is necessarily to hinder and delay other creditors. An instruction to this effect is approved. *Kendall Boot & Shoe Co. v. Bain*, 581.

4. ——— COMMON LAW.—At common law the only things essential to a valid sale of personal property were a proper subject, a price, and the consent of the contracting parties, and, when these concurred, the sale was complete, and the title passed, without anything more, except, where the thing sold was part of a mass, it had to be separated; the statute of fraudulent conveyances, beginning where the common law stopped, requires that the transaction, before considered complete, so as to effect a change in ownership, should be accompanied by a delivery in a reasonable time, regard being had to the situation of the property, and be followed by an actual and continual change of the possession of the thing sold, and an instruction which goes further than the statute is *held* improper and misleading. *Ib.*

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5. EVIDENCE—VENDEE'S PARTICIPATION.—Under the facts, this case belongs to that class of cases where a sale is made to defraud creditors, in which the fraudulent intent is shared by the vendee; and this issue has been fairly submitted to the jury, whose finding is affirmed. *Cahn & Co. v. Groves*, 263.

HIGHWAYS.

1. EVIDENCE OF PUBLIC ROAD.—Where the evidence tends to show that the public road has been traveled and worked from ten to fifteen years, it is a sufficient showing of a "traveled public road" named in the statute requiring signals at public crossings. *The State to use, etc. v. The St. J. etc., Ry. Co.*, 466.

2. PUBLIC ROADS—ORDER OPENING—EVIDENCE OF IRREGULARITIES. If a road has been opened by an order of the county court, and a plat thereof has been filed in the clerk's office, and such road has been used for ten years or more, then it is a public road; and evidence to show irregularities in the court proceedings to open it are inadmissible. *Harper v. Morse*, 470.

HUSBAND AND WIFE. See MARRIED WOMEN, 4, 8, 9.

INCUMBRANCES. See COVENANT FOR TITLE, 1.

INDORSEE. See BILLS AND NOTES, 6.

INFORMATION.

1. KNOWLEDGE OF AFFIANT—CURING OF AFFIDAVIT.—An affidavit, furnishing the basis for an information by the state's attorney, must be on the actual knowledge of affiant; and the perfect allegation of an information will not cure the vice in the affidavit on which it is based. *State v. Davidson*, 9.

2. CRIMINAL LAW—VERIFICATION OF.—An information in the criminal court of LaFayette county is sufficiently verified by the affidavit of the prosecuting attorney to his best information and belief. *State v. Graham*, 527.

INJUNCTION. See MARRIED WOMEN, 4.

1. WASTE—EVIDENCE.—The evidence in this case *held* to support a finding that there was imminent danger of the commission of waste, and justified the granting of an injunction. *Brown v. Miller*, 1.

2. ASSESSMENT OF DAMAGES—COUNSEL FEES.—Upon the dissolution of a temporary restraining order only the necessary counsel fees in obtaining such dissolution can be assessed as damages upon the injunction bond, regardless of the number of counsel actually engaged in the defense. *Neiser v. Thomas*, 47.

3. ——— TIME FOR FILING MOTION.—When the circuit court, on the final hearing of a cause, dissolves a temporary restraining order made by it therein, and the plaintiff in the cause thereon

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appeals from the judgment, the motion for the assessment of damages on the injunction bond may be made by the defendant on the affirmance of the judgment by the appellate court, due notice of the motion to the plaintiff, however, is requisite in such case. *Ib.*

4. ——— EFFECT OF APPEAL—DAMAGES.—In the case of such dissolution of a temporary restraining order, and of an appeal from the judgment by the plaintiff, the appeal, though accompanied by a *supersedeas* bond, does not keep the restraining order in force. Accordingly, no damages should, in such case, be assessed upon the injunction bond for the services of counsel in the appellate court. *Ib.*

5. PLEADING.—Electric light wires were erected by virtue of a municipal ordinance amidst the wires of the Western Union Telegraph Company, and, in an action brought by that company, the electric light company, which had erected these poles, was enjoined from stringing its wires on these poles within a certain distance of the wires of the telegraph company. At the trial it appeared from the evidence that it was not the intention of the electric light company to string its wires within that distance, but, although the defendant was charged with such an intention there was no disclaimer thereof in its pleadings. It also appeared from the evidence that, at the time of the institution of the action, the poles were mortised for cross arms for wires within the distance mentioned, but that this had been done pursuant to a municipal regulation. *Held*, THOMPSON, J., *dissenting*, that, under these circumstances, the evidence at the trial in regard to the intention of the electric light company was not ground for disturbing the judgment of the trial court. *The W. U. Tel. Co. v. Guernsey, etc., Co.*, 120.

6. RIGHT OF PLAINTIFF TO RELIEF.—*Semble* that the rule that a plaintiff is not entitled to relief by injunction against a mischief, when he can guard against it at a slight expense, does not obtain in this state. *Ib.*

7. ———. The evidence in this cause is reviewed, and it is *held*, THOMPSON, J., *dissenting*, that injunction was the proper remedy in the case, since the plaintiff's right in controversy was unquestioned and there was a fair probability of a substantial interference with that right, justifying recourse to a court of equity before the threatened wrong was done, and since an action for damages would not have afforded an adequate remedy. *Ib.*

8. RIGHT OF PLAINTIFF TO RELIEF.—If the act complained of is not a nuisance *per se* but may or may not become a nuisance according to the circumstances, and whether it will operate injuriously is uncertain or contingent, equity will not interfere by injunction. *Ib.* [*Per Thompson, J., dissenting.*]

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9. SAME—When it is sought to restrain a defendant in the lawful pursuit of his business and management of his property, although not upon his own land, and it does not appear that the act or threatened act of the defendant will probably produce serious injury to the plaintiff, the injunction should not be granted; nor should the injunction be granted when the threatened injury, though probable otherwise, can be avoided by the plaintiff by means of a precaution involving only a slight expenditure on his part. *Ib.*

INSTRUCTIONS. See EVIDENCE, 19; NEGLIGENCE, 4, 12, 13; REPLEVIN, 1; SALES, 4, 6. 7; SLANDER, 3, 4, 5, 7, 9.

1. NEGLIGENCE.—An instruction was predicated upon the hypothesis of negligence on the part of the defendant in raising a weight, when, strictly speaking, the injury sued for resulted from the want of ordinary care in attempting to get the weight down after it had been partly raised with an insufficient appliance, and could not safely be raised any further. *Held*, that an assignment of error on the ground of such distinction was too refined for practical purposes and that the giving of the instruction did not constitute prejudicial error. *Girard v. St. Louis Car-Wheel Co.*, 79.

2. EXCESSIVE NUMBER.—The defendant in the cause offered seventeen instructions. *Held* that, under the issues of this cause, that number was excessive, and that the trial court might properly have refused all of them for that reason. *Ib.*

3. SALES—WARRANTY—ISSUES.—Instructions set out in the opinion are criticised, since they nor any other instruction informed the jury what the issues were, and ignored the essential and constitutive fact that they must find that plaintiff had surrendered the typewriter to a person having a paramount title thereto. *Clark v. The People's Collateral Loan Co.*, 248.

4. IGNORING ISSUE.—An instruction that ignores a material issue of fact made by the pleadings is error. *Welsh v. Edmisson*, 282.

5. ASSUMPTION OF FACTS.—The assumption, in an instruction, of facts put in issue by the pleadings is *held* not to require a reversal of the judgment in this cause, since the evidence thereof was very clear and not controverted; but the practice of assuming in instructions facts which are denied by the pleadings is not approved by this court. *Schmitz v. The St. Louis, etc., Ry. Co.*, 380.

6. PRACTICE, TRIAL—CONTRACT—QUANTUM MERUIT.—Where, on the trial in the circuit court of an action instituted before a justice of the peace, there are instructions on the theory of a special contract, and the jury found for the plaintiff on such theory, no injury resulted to the defendant from giving an instruction on the theory of a *quantum meruit*, there being no evidence of the reasonable value for the services sued for. *Lemon v. Lloyd*, 452.

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7. INSURANCE—NOTICE OF LOSS.—Where defendant investigated the loss and acted as though proper notice had been given, an instruction assuming such notice works no harm. *Brown v. Hartford Ins. Co.*, 473.

8. QUANTUM MERUIT—GROUND OF RECOVERY.—In an action by a slave girl against her old master for services, she must recover, if at all, regardless of the intention of one or the other, for the reason, and that alone, that she was induced by the conduct of her old master to render services for him under the belief that she owed him such labor as his slave. Instructions set out in the opinion reviewed and criticised. *Hickam v. Hickam*, 496.

9. CHATTEL MORTGAGE—FRAUD—KNOWLEDGE OF—INSTRUCTIONS WITHOUT EVIDENCE.—An instruction should not be given when there is no evidence on which to base it: and, where a mortgagee pursues his legal remedy to obtain possession of the mortgaged property, no inference can arise from that fact alone that it was his intention thereby to aid the mortgagor to defraud a prior mortgagee, without some proof of his knowledge of such fraudulent intention. *Sparks v. Brown*, 529.

10. PRACTICE—REPETITION OF INSTRUCTION.—Where an instruction is but a repetition of one given it is properly refused. *Kendall Boot & Shoe Co. v. Bain*, 581.

INSURANCE.

1. EVIDENCE OF NOTICE—HARMLESS ERROR—FRAUD.—Where there is no objection by the insurer as to the claim for loss except upon grounds of fraud, the admission in evidence of a conversation with defendant's local agent as to notice of loss, if erroneous, is harmless. *Browne v. Hartford Fire Ins. Co.*, 473.

2. NOTICE OF LOSS—INSTRUCTION.—Where defendant investigated the loss and acted as though proper notice had been given, an instruction assuming such notice works no harm. *Ib.*

3. EVIDENCE—VALUES—PROOF OF LOSS.—While the values stated in the proofs of loss are not evidence of such values, yet an instruction so declaring ought not to be so worded that the jury might well understand that they were directed not to consider plaintiff's estimates of value in his testimony. *Ib.*

4. JAPANESE VASE INCLUDED IN HOUSEHOLD FURNITURE.—A Japanese vase is included in "household furniture, useful and ornamental." *Ib.*

5. CONSTRUCTION OF POLICY—PLATE-GLASS FRONT DOORS AND WINDOWS.—A clause in a tornado insurance policy provided that plate glass in doors and windows, the dimensions whereof are nine square feet or more, was not covered by insurance on the

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building, but must be separately and specifically insured. *Held*, that a plate-glass front which was immovable, and stationary, is covered by the policy, though the glass therein was of greater dimensions than nine feet. *Hale v. Springfield, etc., Ins. Co.*, 508.

6. RULE AS TO THE CONSTRUCTION OF POLICY.—If there is a doubt in respect of the meaning of the terms of a clause of an insurance policy, that doubt must be resolved in favor of the interpretation of the assured, although intended otherwise by the insurer. *Ib.*

JUDGMENT. See ASSIGNMENT, 5.

1. CONTEMPT—SETTING ASIDE JUDGMENT—DISCRETION OF TRIAL COURT.—While, as regards the contempt, the matter is wholly between the court and the contemptuous party, and the court may, in the exercise of its discretion, set aside its judgment, such discretion is the subject of review; but the party seeking to vacate such judgment must show it was either illegal, or else that it should be set aside because the court's discretion was oppressively exercised. *Carr v. Dawes*, 351.

2. MOTION TO SET ASIDE JUDGMENT—DILIGENCE AND MERITS.—Plaintiff sued defendant on a promissory note; the defense was the statute of limitations. The reply was an avoidance of the statute. Plaintiff had two subpœnas served upon defendant, who did not appear at the trial, either in person or by attorney. Thereupon the court struck out his answer and rendered judgment. Fifty-six days after, at the same term, defendant filed an affidavit to set aside the judgment on the ground that pressure of business prevented his attendance, without stating the business and its nature, but alleging his defense was good in law and fact. The affidavit of his attorney also filed stated he was attending to his duty in the legislature, and had at a prior term agreed to continue the cause, and had, therefore, not notified defendant he would be absent. The court sustained the motion, and set aside the judgment. *Held*, error, as it is the duty of the courts to so construe pleadings, and to so adapt the practice as to discourage negligence, deceit and delay; and such applications should show merit as well as diligence, and the statute of limitations is a technical and not a meritorious defense. *Ib.*

3. APPELLATE PRACTICE—SETTING ASIDE JUDGMENT BY DEFAULT—COMMON LAW—STATUTE.—By common law the granting a new trial or setting aside a judgment by default rested in the absolute discretion of the trial court and was not reviewable, and, while the common law as to new trials has been superseded by statute, yet no statute seems to have touched the power and discretion over judgments by default. *Carr v. Dawes*, 598.

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4. —— SETTING ASIDE V. REFUSING TO SET ASIDE A JUDGMENT. There is a distinction between setting aside a judgment and refusing to set it aside. In the former case, the plaintiff is without remedy, in the latter, error will lie in behalf of the defendant. *Ib.*

JUDICIAL NOTICE.

LAW OF KANSAS—COMMON LAW—LAW OF MISSOURI—DAMAGES IN ATTACHMENT.—The statute of Kansas not being in evidence, the court cannot take judicial notice of it, and as the court cannot indulge the presumption that the common law prevails there, it is concluded that the rule of law allowing damages in this case must be found in the laws of this state. *Witascheck v. Glass*, 209.

JURISDICTION.

1. APPELLATE--REMITTITUR OF DAMAGES.—*Quære*, whether a *remittitur* of damages by the voluntary action of the successful party is permissible, when the effect of it is to change the jurisdiction of an appeal in the cause from the supreme court to this court. *Schmitz v. The St. Louis, etc., Ry. Co.*, 380.

2. APPELLATE—TITLE TO REAL ESTATE.—A suit for the admeasurement of dower involves title to land, and this court has, therefore, no appellate jurisdiction thereof. *Glass Co. v. Hanneman*, 614.

3. —— PRACTICE.—If a writ of error is sued out in a cause whereof the supreme court has the exclusive appellate jurisdiction, this court cannot of its own motion dismiss the writ on the ground that the requisite statutory notice thereof has not been given to the defendant in error; but the plaintiff in error may voluntarily dismiss the writ in this court. *Ib.*

JURY. See ADMINISTRATION, 1, 2; COURTS, 1, 2.

JUSTICES' COURTS.

1. SERVICE OF NOTICE OF APPEAL--OFFICER'S RETURN.—The statute makes it the duty of sheriffs, marshals and constables to serve judicial notices, and it is made specially the duty of the constable to serve notice of appeal from a justice, and in doing so he acts in his official capacity under the sanction of his official oath and the responsibility of his bond, and his return is *prima facie* evidence of the service in the manner stated therein. *Thomas v. Moore*, 22.

2. NOTICE OF APPEAL--AMENDED TRANSCRIPT--POWER OF JUSTICE. Though after service of notice of appeal, the justice without rule of court filed an amended transcript of the judgment which varies the amount of the judgment from that given in the original transcript, which the notice described with sufficient accuracy, yet in passing upon the sufficiency of the notice, the court

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cannot consider the amended transcript as the justice has no power to file such transcript for an appeal without an order of court. *Ib.*

3. NOTICE OF APPEAL.—DUTY OF COURT.—When the appeal from the judgment of the justice is taken on a day subsequent to its rendition, and no notice thereof was given ten days before the second term of the appellate court thereafter, then the judgment of the justice shall be affirmed at the election of the appellee. In the absence of such notice and the appearance of the appellee the circuit court has no jurisdiction to enter any other judgment than that of affirmance or dismissal of the appeal. *Wolff v. Coffin*, 190.

4. JURISDICTION—RECORD MUST SHOW FILING OF CAUSE OF ACTION. The lodging with the justice of the paper, which is the foundation of the action, is a requisite to jurisdiction, and it must by some means be made affirmatively to appear by the record, if not by a docket entry, then by the paper itself, being among the original papers in the cause. *Olin v. Zeigler*, 193.

5. SETTING ASIDE AFFIRMANCE OF JUDGMENT FOR NON-PAYMENT OF FILING FEE.—When the circuit court affirms the judgment of a justice of the peace for non-payment of the filing fee by the appellant pursuant to the special statute applicable to the city of St. Louis, it has power to set aside the affirmance, and reinstate the cause during the same term, if the appellant shows sufficient exercise for the non-payment of that fee. *Vastine v. Bailey*, 413.

6. SUFFICIENCY OF STATEMENT.—In actions before justices of the peace, a statement is sufficient, if it advise the defendant of what he is sued for, and is so definite as to bar an action for the same matter. *Lemon v. Lloyd*, 452.

7. CONSTRUCTION OF STATUTE—EVERY LITIGANT HIS OWN LAWYER. The statute governing practice and proceedings in justices' courts should be construed so as to make it possible for any plain, common sense citizen to appear there and prosecute or defend any ordinary action. *Ib*,

8. ACCOUNT—CONTRACT—QUANTUM MERUIT.—In a suit in a justice's court on an account for services of any kind, it is sufficient proof to authorize a recovery, if it be shown the services were rendered under a special contract to pay so much per day, week or month or a special sum for the entire service ; or, failing in that, even if it only appear there was a contract of employment, but none as to compensation, still the plaintiff ought to be permitted to recover, if he shows by evidence what such services were reasonably worth. *Ib.*

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9. SUFFICIENCY OF THE STATEMENT OF THE CAUSE OF ACTION.—The statement of a cause of action in a suit instituted before a justice of the peace is sufficient, if it advises the defendant of the nature of the cause of action, and is sufficiently definite to bar another action for the same matter. *Bauer v. Burnett*, 654.

KANSAS. See JUDICIAL NOTICE, 1.

KANSAS CITY. See CONSTRUCTION, 2; DEFENSE, 3; DEFINITION, 4; DRAMSHOPS, 1, 2, 3, 4, 5; PLEADING, 6; TAX BILLS, 1.

LANDLORD AND TENANT. See DAMAGES, 1; FORCIBLE ENTRY AND DETAINER, 1; TENANT, 1.

1. NOTICE OF INTENTION TO QUIT—LIABILITY CONTINUOUS—INSTRUCTIONS.—A tenant from month to month, who leaves the premises without giving one month's notice in writing to the landlord of his intention to terminate the tenancy, is liable for the rent of such premises for the month succeeding. Instructions set out in the opinion are examined, and some approved and others condemned. *Buck v. Lewis*, 227.

2. REMOVAL—DELIVERY OF KEY—SURRENDER.—The removal of a tenant from month to month from the premises, the delivery of the keys to the landlord, or any efforts of landlord to relet the premises, will not amount to an accepted surrender and release of the tenant from liability for the unexpired term. *Ib.*

3. DEFINITION—SURRENDER.—A surrender is the yielding up the estate to the landlord so that the leasehold becomes extinct by mutual agreement of the parties. It it either by words by which the lessee manifest his intention of yielding up his interest in the premises, or by operation of law, as for instance, where, by consent of both parties, another becomes tenant of the premises, and the landlord collects rent from him. *Ib.*

4. LANDLORD AND TENANT—SALE UNDER EXECUTION.—A sale under execution of a lessor's title to land will not avoid a prior lease in the absence of evidence that the judgment, under which the execution was issued, was rendered before the lease was made. *Smith v. Aude*, 631.

5. QUITTING WITHOUT NOTICE—RELETTING—SURRENDER.—Where a tenant from month to month quits without leave, if the landlord after receiving the key and taking possession relets for the next month at the same rent, this would act as a release of the tenant, and if he relets for a part of the month, and receives less rent than would be due from the tenant, the tenant would only be liable for the difference. *Ib.*

6. SERVICE OF NOTICE TO QUIT.—A store in the city of St. Louis was held by the storekeeper without any contract therefor in writing, and the tenancy was, therefore, one from month to month. (R. S. 1889, sec. 6371.) A notice for the termination of

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this tenancy was, during the momentary absence of the tenant, delivered by the landlord to one of the tenant's salesmen, who were, owing to the absence of their employer, temporarily in charge of the store, and who were in the habit of receiving all papers delivered there in the absence of and for their employer, and placing the same in a receptacle provided for that purpose. *Held*, that the salesman thus served was not the agent of the tenant for the purpose of the service of such notice within the meaning of the statute, and that, it not appearing that said notice reached the tenant in person, the service was insufficient. *Van Studdiford v. Kohn*, 436.

7. ——— SAME.—The statute providing for the service of such notice requires a personal service, at least in all cases wherein such service can conveniently be made. *Ib.*

LIEN. See CHATTEL MORTGAGE, 1, 2; EXEMPTIONS, 1, 2; FRAUDULENT CONVEYANCES, 1, 2; COVENANT FOR TITLE, 1; MECHANIC'S LIEN; PARTNERSHIP, 2, 3, 4.

LIMITATION. See QUANTUM MERUIT, 4; STATUTE OF LIMITATIONS, 1.

LOCAL OPTION.

1. BURDEN OF PROOF.—The adoption of the local-option law is established *prima facie* by the state by the production of a certified copy of the result of the election, as spread upon the records of the county court in compliance with that law, and proof that the requisite subsequent publication of the result was made. (*State v. Searcy*, 39 Mo. App. 393, *is approved.*) *The State v. Searcy*, 421.

2. CERTIFICATE OF ELECTION.—It is not essential to the validity of the election, putting the local-option law in force in any locality, that any certificate of the election should be signed by the two justices or the two judges of the county court, called in to aid the county clerk in casting up the votes. *Ib.*

3. SALES BY DRUGGISTS.—A person who is indicted for a violation of the local-option law, and defends on the ground that he is a licensed druggist and as such made the sale of liquor for which he is indicted, must bring his sale within the provisions of the law relating to such sales by druggists, and, where the sale is for medicinal purposes, must, therefore, show a physician's prescription. *Ib.*

LOTTERY TICKET. See ACTION, 8.

MALICE. See ATTACHMENT, 4; DEFINITIONS, 1; SLANDER.

MARRIED WOMEN.

1. POSSESSION OF WIFE'S REALTY—TERMINATION OF AGENCY.—A woman is married on one day, and her agent leases her land on the next day. Such lease conveys nothing, as the possession belongs to the husband and the marriage terminates the agency. *Brown v. Miller*, 1.

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2. ——— CONVEYANCE OF WIFE'S REALTY—DEED—ESTOPPEL. Under the statute, the sole deed of the husband will not answer even to convey his marital right of possession in his wife's realty. An estoppel *in pais* can never operate to prejudice the rights of the person estopped, except when the sole deed of such person would have a similar operative effect. *Ib.*

3. PLEADING—LIEN ON PRODUCTS OF SEPARATE ESTATE.—The separate property of a married woman, when it is sought to charge it with a lien under the statute, must be described in the petition, and, the separate estate being an indispensable element of the procedings, must exist when the contract is made out of which the liability arises, and its existence must continue to the institution of the suit, and a petition failing to show these essential facts is fatally defective. *Osborne & Co. v. Graham*, 28.

4. LIEN ON PRODUCTS OF SEPARATE REALTY—PRACTICE—RECEIVER OR INJUNCTION.—In order to continue the *res* so that the same may be subject to a lien, the creditor may invoke the appointment of a receiver or the aid of an injunction. *Ib.*

5. SALE—DEBT OF HUSBAND—LIEN ON PRODUCTS OF WIFE'S REALTY—MATERIALS FOR ITS CULTIVATION.—A review of the evidence in this case shows the debt sought to be charged as a lien of the products of the realty to be the sole debt of the husband, and that the materials—a reaper, a binder and a mower—were not principally purchased for the cultivation of the wife's real estate, though incidentally used thereon, and such secondary use is not sufficient to charge the products of her real estate. *Ib.*

6. LIEN ON PRODUCTS OF WIFE'S REALTY—NECESSARY MATERIALS—EXPENSE.—Materials furnished for the cultivation of the wife's real estate, to bind her separate estate in the annual products thereof, should be for necessary materials and of a kind and quality not unnecessarily expensive. *Ib.*

7. INDORSEMENT OF PROMISSORY NOTE.—A married woman is not *sui juris*, and she cannot make a contract of indorsement, either in express terms or by implication. *Moeckel v. Heim*, 340.

8. ——— STATUTE—HUSBAND'S BENEFIT—COLLECTION.—The statute not only requires express assent for the husband to sell, incumber or otherwise dispose of the wife's property, but the assent, in order that the property may become the husband's, must also be that he dispose of it for his own use and benefit; and her mere signature on the back of a note is, at most, an assent that he might collect the money due thereon for her. But whether this would be express assent, *quœre*. *Ib.*

9. SURETY FOR HUSBAND CHARGES HER SEPARATE ESTATE—CREDITOR'S RIGHTS IN EQUITY.—Plaintiff, a married woman, signed her husband's note as surety. The husband without authority pledged notes indorsed by the wife—her separate property—as

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collateral security for his note. Plaintiff then brings her bill in equity against her husband's creditors—the holders of her husband's note—to recover her notes so pledged as collateral. *Held*,—

(1) In becoming surety for her husband, plaintiff charged her separate estate.

(2) The husband's note on which she is surety, chargeable on the notes plaintiff is seeking to recover in this action, may be interposed in defense of the action, if properly set up. *Ib.*

10. PERSONAL JUDGMENT.—A personal judgment cannot be rendered against a married woman for a debt contracted prior to the revision of 1889 of our statutes. *Bruns v. Capstick*, 397.

MASTER AND SERVANT.

1. CONTRIBUTORY NEGLIGENCE.—A carpenter, while at work on an elevator shaft and while the elevator was in use, and above him, leaned a portion of his body inside of the shaft. The boy in charge of the elevator, though knowing that persons were at work in the shaft, lowered the elevator at full speed without giving the warning which he had been accustomed to give, and the carpenter, being absorbed in his work and in a poor position for observation, was struck by the elevator unawares and injured. *Held* (ROMBAUER, P. J., *not concurring*), that it was a question of fact for the jury, whether or not the carpenter was guilty of contributory negligence. *Hughes v. Fagin*, 37.

2. FELLOW-SERVANTS.—At the time of such injury the building in which it occurred was in process of erection, and the carpenter was engaged at work in the course of its construction. The elevator was used at the time for the purpose of raising and lowering the workmen and their materials, and also persons desirous of inspecting rooms in the building. *Held*, that the carpenter and the elevator boy were fellow-servants engaged in the same general employment. *Ib.*

3. INJURY OF SERVANT THROUGH INCOMPETENCY OF FELLOW-SERVANT. *Held* (ROMBAUER, P. J., *dissenting*), that, where a servant continues in the service with knowledge of the incompetency of a fellow-servant without complaint, it is ordinarily a question for the jury whether he is to be deemed to have accepted the risk of injury through such incompetency; though, where the danger is so glaring that it is rash and foolhardy for him to continue in the service, the court can so pronounce as a matter of law. *Ib.*

4. NEGLIGENCE.—A crane for the raising of heavy weights was firmly attached to a foundry building, and used in connection with the foundry business. While a very heavy weight was being raised with it by employes at the foundry, the building began to

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crack, owing to the strain to which it was subjected. Thereon the superintendent of the workmen directed those engaged in lifting the weight to swing the weight around, knowing that the commencement of this operation would increase the strain upon the building. *Held*, that, although none of the employes at the foundry were at that moment at work in the building, still, since they were liable to return to work in it, it was negligence upon the part of the superintendent not to warn them of the danger of what he was about to do. *Girard v. St. Louis Car-Wheel Co.*, 79.

5. RAILROADS—NEGLIGENCE OF FELLOW-SERVANTS.—The master is not responsible to those engaged in his employment for injuries suffered by them as the result of the negligence, carelessness or misconduct of other servants in his employ engaged in the same common service, unless the master himself had been in fault; and a brakeman in a switch gang is a fellow-servant with the engineer in charge of the switch engine. *Warmington v. The Atchison, Topeka & Santa Fe Ry. Co.*, 159.

6. KNOWLEDGE OF CO-SERVANTS.—If a servant discovers that a fellow-servant is careless or incompetent and continues in the employment of his master without protest or complaint he is deemed to assume the risks of such danger and to waive any claim upon his master for damages in case of injury; and so a brakeman in a switch gang, who knows of the carelessness and incompetency of the engineer in charge of the switch engine, cannot recover for injuries inflicted through the carelessness of the latter. *Ib.*

7. DISCHARGE—TRIAL PRACTICE—EVIDENCE IN REBUTTAL.—In an action for breach of contract in discharging the servant without cause, the master set up the incompetency and drunkenness of the servant as a defense, and his evidence tended to show that the servant was drunk most all of the time. It was proper, therefore, for the servant to show in rebuttal by witnesses that the plaintiff was sober at such time as they saw him. *Collins v. Glass*, 297.

8. ACTION FOR DISCHARGE—PROCEDURE—DEFENSE—BURDEN OF PROOF. In an action for the unreasonable discharge of a servant, the plaintiff does not have to plead and prove his sobriety. Drunkenness is matter of defense, and the matter of establishing it is upon the defendant; and the rule as to parties occupying confidential relations does not apply. *Ib.*

MECHANICS' LIEN.

1. LIEN ACCOUNTS—SUFFICIENCY OF.—A lien account which fails to show when the material was furnished is insufficient, as it cannot be determined whether the account is one, and that every portion of it should be included in the lien. *Curless v. Lewis*, 278.

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2. DEFINITIONS—JUST AND TRUE ACCOUNT.—"A just and true account" is an itemized account with dates, so that it may be seen from the face thereof that it is one for which a lien may be had. *Ib.*

3. SUFFICIENCY OF ACCOUNT.—An account which is filed to obtain a mechanics' lien, and which contains but a single item in gross, and without detail, for the entire contract price of a building, is insufficient to sustain the lien as to that item; and, under the rule above stated, the defendant in an action for the enforcement of the lien may contest the validity of the lien in respect to that item, although the account was received in evidence without objection on his part. *Bruns v. Capstick*, 397.

MISSOURI. See JUDICIAL NOTICE, 1.

MARSHALS. See APPEALS, 1; JUSTICES' COURTS, 1; NOTICES, 1.

MINORS. See MUNICIPAL CORPORATIONS, 4.

MISTAKE.

INTEREST PAID TO HOLDER OF FORGED NOTE RECOVERABLE—COLLATERAL SECURITY—COSTS.—Plaintiff assumed the payment of a note. The holder pledged the note as collateral to H. & P., and afterwards forged a copy thereof and sold it, with the deed of trust securing it, to A., to whom plaintiff paid interest, thinking it the genuine note. On plaintiff's bill of interpleader against H. & P. and A., with other pleadings properly presenting the issues, the trial court properly found, and *held*,—

(1) Plaintiff had paid A. the interest under mutual mistake, by which he was entitled to recover it back.

(2) H. & P. were the owners of the note and deed of trust, and A. had no interest therein.

(3) That A. pay the costs. *Jourdan v. Harrison & Platt*, 172.

MUNICIPAL CORPORATIONS.

1. PUBLIC CORPORATIONS—NOT LIABLE FOR REFUSAL TO ACCEPT BID. Although a notice has been published inviting bids for corporate securities, yet the contract is incomplete until the proposal is accepted, and the corporation inviting the proposal is not liable for damages for refusing to accept an offer, even though it be the highest regular offer made; much more so when the notice reserves the right to reject any and all bids. *Coquard v. School District*, 6.

2. CITY OF ST. LOUIS—REGULATION OF THE USE OF STREETS.—The city of St. Louis has the charter power to regulate the use of streets within its limits, and this power is not limited to the regulation of the use of streets for travel, but extends to other beneficial uses which the public good and convenience may from time

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to time require, and, among other things, to the erection of poles and stringing thereon of wires for the supply of electric light by private corporations to consumers. *The W. U. Tel. Co. v. Guernsey, etc., Co.*, 120.

8. ——— ———. Such power may be exercised both as to an adjoining owner and as to a licensee having prior rights of user, such as the Western Union Telegraph Company, and may subject either to inconvenience, so long as it does not amount to a substantial subversion of private rights. The fact, that said telegraph company was inconvenienced, would, therefore, not render the exercise of the power illegal, so long as its rights were not substantially invaded; but that company is nevertheless, owing to the nature of its obligations, entitled to have the rigid protection of the law thrown around the instrumentalities which are essential to the faithful performance of its duties. *Ib.*

4. CITY OF THE FOURTH CLASS—POWER TO REGULATE BILLIARDS—MINORS.—A city of the fourth class has power to regulate billiard tables and to inflict a penalty upon the keeper of such table for permitting minors to play thereon without the consent of their parents. *The City of Plattsburg v. Trimble*, 459.

5. ORDINANCE PROHIBITING MISDEMEANOR—VIOLATION—PROCEDURE. Municipal corporations may, by ordinance, prohibit acts which are made misdemeanors under the general statutes of the state, and, for violation of such ordinances, may maintain a proceeding in its own name to impose and collect a fine. *Ib.*

6. CITIES, TOWNS AND VILLAGES—COUNTY COURT—APPEAL.—No appeal lies fron the action of the county court incorporating a town under section 977, Revised Statutes, 1889. *Hall v. DeArmond*, 596.

MONEY HAD AND RECEIVED. See ACTION, 8.

MORTGAGE. See CHATTEL MORTGAGE, 1, 2.

NEGLIGENCE. See BILLS AND NOTES, 3.

1. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—A carpenter while at work on an elevator shaft and while the elevator was in use and above him leaned a portion of his body inside the shaft. The boy in charge of the elevator, though knowing that persons were at work in the shaft, lowered the elevator at full speed without giving the warning which he had been accustomed to give, and the carpenter, being absorbed in his work and in a poor position for observation, was struck by the elevator unawares and injured. *Held* (ROMBAUER, P. J., *not concurring*), that it was a question of fact for the jury, whether or not the carpenter was guilty of contributory negligence. *Hughes v. Fagin*, 37.

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2. —— FELLOW-SERVANTS.—At the time of such injury the building in which it occurred was in process of erection, and the carpenter was engaged at work in the course of its construction. The elevator was used at the time for the purpose of raising and lowering the workmen and their materials, and also persons desirous of inspecting rooms in the building. *Held*, that the carpenter and the elevator boy were fellow-servants engaged in the same general employment. *Ib.*

3. —— INJURY OF SERVANT THROUGH INCOMPETENCY OF FELLOW-SERVANT.—*Held* (ROMBAUER, P. J., *dissenting*), that where a servant continues in the service with knowledge of the incompetency of a fellow-servant without complaint, it is ordinarily a question for the jury whether he is to be deemed to have accepted the risk of injury through such incompetency; though, where the danger is so glaring that it is rash and foolhardy for him to continue in the service, the court can so pronounce as a matter of law. *Ib.*

4. INSTRUCTIONS.—An instruction was predicated upon the hypothesis of negligence on the part of the defendant to raise a weight, when, strictly speaking, the injury sued for resulted from the want of ordinary care in attempting to get the weight down after it had been partly raised with an insufficient appliance, and could not safely be raised any further. *Held*, that an assignment of error on the ground of such distinction was too refined for practical purposes, and the giving of the instruction did not constitute prejudicial error. *Girard v. St. Louis Car-Wheel Co.*, 79.

5. MASTER AND SERVANT.—A crane for the raising of heavy weights was firmly attached to a foundry building, and used in connection with the foundry business. While a very heavy weight was being raised with it by employes at the foundry, the building began to crack, owing to the strain to which it was subjected. Thereon the superintendent of the workmen directed those engaged in lifting the weight to swing the weight around, knowing that the commencement of this operation would increase the strain upon the building. *Held*, that, although none of the employes of the foundry were at that moment at work in the building, still, since they were liable to return to work in it, it was negligence upon the part of the superintendent not to warn them of the danger of what he was about to do. *Ib.*

6. RAILROADS — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — EVIDENCE.—The evidence in this case is reviewed and the case is *held* by SMITH, P. J., to fall within the rule that after discovering the danger in which plaintiff had placed himself, even by his own negligence, if the defendant could have avoided the injury by the exercise of reasonable care, the exercise of that care becomes a duty, for the neglect of which the defendant is liable. [ELLISON and GILL, JJ., *dissenting*, the former in a separate opinion.] *Warmington v. The Atchison, T. & S. F. Ry. Co.*, 159.

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7. MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANTS.—The master is not responsible to those engaged in his employment for injuries suffered by them as the result of the negligence, carelessness or misconduct of other servants in his employ engaged in the same common service, unless the master himself had been in fault; and a brakeman in a switch gang is a fellow-servant with the engineer in charge of the switch engine. *Ib.*

8. ——— ——— KNOWLEDGE OF CO-SERVANTS.—If a servant discovers that a fellow-servant is careless or incompetent and continues in the employment of his master without protest or complaint, he is deemed to assume the risks of such danger, and to waive any claim upon his master for damages in case of injury; and so a brakeman in a switch gang, who knows of the carelessness and incompetency of the engineer in charge of the switch engine, cannot recover for injuries inflicted through the carelessness of the latter. *Ib.*

9. TRIAL PRACTICE—CONTRIBUTORY NEGLIGENCE—PLEADING—DIRECTION OF THE COURT.—When the inference of contributory negligence arises from the plaintiff's own testimony, the defendant may take advantage of it regardless of whether such special defense be pleaded or not: and when such contributory negligence is shown as defeats plaintiff's right of action and disproves his case, it is the duty of the court to declare the result to the jury as a matter of law. *Ib.*

10. APPELLATE PRACTICE—RULES AS TO INTERFERENCE WITH VERDICT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—An appellate court cannot reverse, merely because the verdict is not altogether to its liking. It must defer to the jury in the first place, and then leave to the trial judge to say if the preponderance is so strong against the verdict that it should not stand. It can only interfere when the evidence or the inference therefrom is all against the finding, or there is such overwhelming preponderance against the verdict that it can only be accounted for on the ground of passion, partiality or prejudice. On the facts in this case the question of contributory negligence was properly submitted to the jury, the proof not being so clear and free from conflict that reasonable men, acting impartially, could only determine it in one way, and their finding is conclusive. *Davis v. The K. C. Belt Ry. Co.*, 180.

11. CONTRIBUTORY NEGLIGENCE—JURY QUESTION.—Though plaintiff heedlessly entered upon the defendant's railroad track in the path of the coming engine, yet there was evidence tending to prove that defendant could, by the exercise of ordinary care, have discovered the impending peril in time to have avoided the injury, which was a question for the jury. *Ib.*

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12. ——— PERILOUS SITUATION—INSTRUCTION—HARMLESS ERROR. Under the circumstances and situation of the parties in this case, the being upon the track in front of the engine was necessarily a position of peril; and an instruction in relation thereto and set out in the opinion, though subject to verbal criticism, was merely harmless error. *Ib.*

13. ——— SELF-PRESERVATION—INSTRUCTION—DEFENSE—PLEADING AND PROOF.—An instruction declaring the instincts of self-preservation are not proper consideration, in determining whether plaintiff exercised ordinary care, was properly refused in this case because:

(1) There was plenty of instructions without it, and it was unnecessary in advising the jury as to their verdict. (The practice of asking and giving numerous instructions strongly disapproved.)

(2) It is a mere abstraction, and clothed in such language as was calculated to mystify the jury.

(3) It does not properly declare the law of this state, where contributory negligence is a matter of defense—must be alleged in the answer and proved to exist by a preponderance of the evidence. *Ib.*

14. CONTRIBUTORY NEGLIGENCE—DEMURRER TO THE EVIDENCE—CARELESSNESS AFTER KNOWLEDGE OF PERIL.—If without dispute it appears that plaintiff entered upon the railroad track immediately in front of the moving car, so close thereto that even with the greatest care defendant's servants were powerless to avert the injury, then plaintiff's carelessness would preclude his recovery, and a demurrer to the evidence should be sustained; but in this case, while defendant's evidence tended to prove this state of facts, yet there was testimony tending to sustain the claim that plaintiff stood upon the track, upon which the train was approaching, long enough prior to the accident, and far enough away from the coming train, for those operating the same by the exercise of ordinary care, to discover his peril in time to have stopped the train before striking the plaintiff, which, if true, will entitle plaintiff to recover, even though he was negligent in entering and stopping upon the track, and, therefore, the demurrer to the evidence was properly overruled. *Duncan v. Mo. Pac. Ry. Co.*, 198.

15. FLAGMAN — CONTRIBUTORY NEGLIGENCE — INSTRUCTION. The fact that an ordinance requires a railway company to keep a watchman, whose duty it is to warn persons about to cross the tracks of approaching trains, does not absolve such persons from a like duty of ordinary care when crossing such place of danger; they are bound to use their senses, and do all a prudent man, under the circumstances, would do to avoid danger.

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Where a person approaching such place of danger notes the absence of such watchmen, sees the moving train by which he is subsequently hurt, and has notice of all the absent watchmen could have imparted to him, and voluntarily puts himself in a place of danger, he cannot charge his misfortune to any omission of duty by the watchman. An instruction set out in the opinion is disapproved. *Ib.*

16. ——— COMBINED NEGLIGENCE—PROXIMATE CAUSE.—In this case the alleged negligence of the watchman in failing to warn plaintiff of the approaching train was prior in point of time to the negligent acts of plaintiff, and there is no room for the application of the rule, that where plaintiff is put in danger by the combined acts of plaintiff and defendant, and defendant sees, or by ordinary care could see, the peril of the plaintiff in time to avoid the danger, then plaintiff may recover, but plaintiff 's negligence in going on the track being the approximate cause, the other rule applies, that to make a defendant liable for an injury, when plaintiff has been also negligent, it should appear that the proximate cause of the injury was the omission of the defendant, after becoming aware of the danger to which plaintiff was exposed. *Ib.*

17. PROXIMATE CAUSE—PROBABLE RESULT—EVIDENCE.—Liability does not follow every negligent act, though injury does ensue. The negligent act must be the proximate cause of the injury, which must also have been the natural and probable result of the act. The evidence examined and found not to sustain the claim that the plaintiff 's injury was the natural or probable cause of defendant's negligence. *Hicks v. The Mo. Pac. Ry. Co.*, 304.

18. CONTRIBUTORY NEGLIGENCE.—Where the plaintiff, standing on his wagon loading shingles from a car to which his team is tied, sees a car which has been switched onthe same track coming faster than usual down the grade to the car where he is working with increasing speed, does not sit down though he has left the lines tied to the car and the horses are hitched to the wagon, he does not exercise such common prudence as to entitle him to recover. [GILL, J., *dissenting.*] *Ib.*

19. SAME [SMITH, P. J., *concurring*].—In order to defeat the right of action it must appear, but for the plaintiff 's negligence operating as an efficient cause of the injury in connection with the fault or neglect of the defendant, the injury would not have happened. *Ib.*

20. DIFFERENCE OF FAIRMINDED MEN.—The rule that negligence cannot be conclusively established by a state of facts upon which fairminded men may well differ, if allowed to prevail, would render the appellate court powerless to reverse any cause for contributory negligence. *Ib.*

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21. RAILROADS—HIGHWAY.—A railway company, whose tracks cross a public highway, and whose cars stand disconnected upon the highway, with a space between them sufficiently large to permit persons to pass through it, is guilty of negligence, if it closes this space suddenly and without warning to the traveling public; and, in the case of such negligence, it is liable for the injury thereby caused to a person, who, without contributory negligence on his part, climbs over the drawhead of a car instead of passing through the open space. *Schmitz v. The St. Louis, etc., Ry. Co.*, 380.

22. ——— CONTRIBUTORY NEGLIGENCE.—The person thus injured, who was a boy only nine years old, testified that he climbed over the drawhead instead of passing through the open space, because he would get mashed if he passed between the cars. *Held*, that this remark did not conclusively show that he appreciated the danger of his act, because his testimony, taken as a whole, rendered the inference permissible that this remark was made in the light of subsequent events, and not because he anticipated what happened. *Ib.*

23. KILLING STOCK—NEGLIGENCE.—Where the evidence fails to show that the engineer in charge of the train ever saw the cow sued for, before he struck her, or that after seeing her, if such was the fact, the train could have been stopped with safety before striking her, but, on the contrary, shows the collision was almost simultaneous with her getting on the track in an attempt to cross before the engine, there can be no recovery. *Davis v. The Wabash Ry. Co.*, 477.

24. CONTRIBUTORY NEGLIGENCE—DEMURRER TO EVIDENCE—INSTRUCTION.—A six-year-old boy was permitted by the driver and conductor of a street car to ride on the front platform of the car, and to undertake to alight from said platform, and, while in the act of so alighting, by a sudden lurch forward, he was thrown off and under the car and injured. *Held*, a sufficient statement of facts to go to the jury on the question of negligence, in an action by the father for the loss of service; and that the father's consent for the son to ride upon defendant's car is not such contributory negligence as to take the case from the jury, as such consent is not the direct and proximate cause of the injury. An instruction ignoring contributory negligence approved. *Buck v. The People's, etc., Ry. Co.*, 555.

25. CHILD—AUTHORITY OF DRIVER—FARE—PASSENGER—PRESUMPTION. *Held, arguendo*:—

(1) Negligence cannot ordinarily be imputed to a six-year-old child.

(2) It is within the scope of the employment of a driver who is also a conductor to receive passengers on the car; and to let them off.

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(3) The omission of the driver to demand or collect fare could not affect the boy's *status* as a passenger, or his right to the exercise of the highest possible degree of care and vigilance in the conduct and management of the car; and defendant would be liable for the slightest negligence.

(4) If the plaintiff consented to his son accepting the invitation of the defendant's driver to ride upon the car the former had the right to presume that the driver would assign his son to some safe place in the car, instead of needlessly exposing him to the risk and peril of riding on, and getting off, the front platform. Presumptions as to comparative safety of the public streets and street-cars for children are mentioned in the opinion. *Ib.*

26. DEFINITIONS—REASONABLE CARE.—Reasonable care and prudence imply the converse of negligence; and, if reasonable care and prudence would have prevented the injury, then defendant is guilty of negligence. *Ib.*

NOTICES. See APPEAL, 3; BILLS AND NOTES, 4.

1. JUSTICES' COURTS—SERVICE OF NOTICE OF APPEAL—OFFICER'S RETURN.—The statute makes it the duty of sheriffs, marshals and constables to serve judicial notices, and it is made specially the duty of the constable to serve notice of appeal from a justice, and, in doing so, he acts in his official capacity under the sanction of his official oath and the responsibility of his bond, and his return is *prima facie* evidence of the service in the manner stated therein. *Thomas v. Moore*, 22.

2. ——— NOTICE OF APPEAL—AMENDED TRANSCRIPT—POWER OF JUSTICE.—Though after service of notice of appeal, the justice, without rule of court, filed an amended transcript of the judgment which varies the amount of the judgment from that given in the original transcript, which the notice described with sufficient accuracy, yet. in passing upon the sufficiency of the notice, the court cannot consider the amended transcript as the justice has no power to file such transcript for an appeal without an order of court. *Ib.*

3. ——— NOTICE OF APPEAL—DUTY OF COURT.—When the appeal from the judgment of the justice is taken on a day subsequent to its rendition, and no notice thereof was given ten days before the second term of the appellate court thereafter, then the judgment of the justice shall be affirmed at the election of the appellee. In the absence of such notice and the appearance of the appellee the circuit court has no jurisdiction to enter any other judgment than that of affirmance or dismissal of the appeal. *Wolff v. Coffin*, 190.

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4. LANDLORD AND TENANT--NOTICE OF INTENTION TO QUIT—LIABILITY CONTINUES—INSTRUCTIONS.—A tenant from month to month, who leaves the premises without giving one month's notice in writing to the landlord of his intention to terminate the tenancy, is liable for the rent of such premises for the month succeeding. Instructions set out in the opinion are examined, and some approved and others condemned. *Buck v. Lewis*, 227.

5. LANDLORD AND TENANT--SERVICE OF NOTICE TO QUIT.—A store in the city of St. Louis was held by the storekeeper without any contract therefor in writing, and the tenancy was, therefore, one from month to month. (R. S. 1889, sec. 6371.) A notice for the termination of this tenancy was, during the momentary absence of the tenant, delivered by the landlord to one of the tenant's salesmen, who were, owing to the absence of their employer, temporarily in charge of the store, and who were in the habit of receiving all papers delivered there in the absence of, and for, their employer, and placing the same in a receptacle provided for that purpose. *Held*, that the salesman thus served was not the agent of the tenant for the purpose of the service of such notice within the meaning of the statute, and that, it not appearing that said notice reached the tenant in person, the service was insufficient. *Van Studdiford v. Kohn*, 437.

6. SAME.—The statute providing for the service of such notice requires a personal service, at least in all cases wherein such service can conveniently be made. *Ib.*

NUISANCES.

FLOODING LAND—PERMANENT DAMAGES.—In cases of nuisance plaintiff cannot recover for damages not sustained when his action is commenced. When the injury inflicted is of a permanent character and goes to the entire value of the estate, the whole injury is suffered at once, and a recovery should be had therefor in a single suit, and no subsequent action can be maintained for the continuance of said injury. But when the wrong done does not involve the entire destruction of the estate, or its beneficial use, but may be apportioned from time to time, separate actions must be brought to recover the damages sustained. *Markt v. Davis*, 272.

PARENT AND CHILD.

1. PHYSICAL INJURY TO CHILD—FATHER'S MEASURE OF DAMAGES FOR NURSING OF CHILD.—If a child suffers physical injury through the negligence of a railway company, its father is entitled to recover, as part of his damages, reasonable compensation for the services of both his wife and himself in nursing the child. *Schmitz v. The St. Louis, etc., Ry. Co.*, 380.

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2. PHYSICAL INJURY TO CHILD—FATHER'S RIGHT OF RECOVERY FOR SERVICES OF CHILD—SUFFICIENCY OF EVIDENCE.—The right of a father to recover for the value of the services of his child, when such child is injured through the negligence of a third person, is predicated upon the relation of master and servant; hence, it is necessary in such case to allege and prove the existence of that relation. But that relation is established by proof that the child was only nine years old; that he lived with his parents at the time of and since the injury; and that he was taken to his home when he was injured, and was nursed by his parents for several months thereafter. *Ib.*

3. INJURY TO MINOR CHILD—MEASURE OF PARENT'S DAMAGES FOR LOSS OF SERVICES.—In assessing the damages of a father for the loss of the services of his minor child, when the child has been injured, but not killed, through the negligence of the defendant in the action, no deduction should be made for the cost of the support of the child subsequent to the injury. *Ib.*

4. ——— DAMAGES OF PARENT FOR LOSS OF SERVICES—BURDEN OF PROOF.—If a child, thus injured, is still capable of performing some kind of work, then the father, in suing for the loss of the services of the child, must establish by evidence the probable earning capacity of the child in its injured condition in order to make out a case. *Ib.*

5. PLEADING — SERVICE OF CHILD — ALLEGATION OF SERVANT—INSTRUCTION.—A petition of the father for the loss of services of an infant son, by reason of injuries received through defendant's negligence, is not fatally defective because it fails to allege specifically that said son is the servant of the plaintiff, when the relation of father and son, the infancy of the son, and the right of the father to the services of the son, are fully set out. Such petition defectively states the plaintiff's title to his right of action, but does not wholly fail to state a title at all; an instruction on the same point is approved. *Buck v. The People's, etc., Co.*, 555.

6. FATHER'S RIGHT TO SERVICE.—The right of action to recover for the services of the child is presumed to be in the father, and continues in him till the child's emancipation is shown, or the right is waived; and this right grows out of, and is correlative to, the father's obligation to support. *Ib.*

7. PLEADING—PRACTICE—CAUSE OF ACTION—OBJECTION—AIDER BY VERDICT.—Both under the common law and the statute, when anything is omitted in the declaration, though it be matter of substance, if it be such that, without proving it at the trial, the plaintiff could not have had a verdict, and there is a verdict for plaintiff, such omission is no cause for arresting or reversing the judgment; and the rule is established in this state that, if material matter is not expressly averred, but is necessarily

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implied, the defect is cured by verdict. If, in such case, defendant pleads to the merits, he waives objection to mere formal defects, and will not be heard at the trial, or on appeal, to object that the petition does not state a cause of action, which objection can only be interposed when the petition wholly fails to state a cause of action. *Ib.*

PARTIES. See ASSIGNMENT, 7.

PARTNERSHIP.

1. ASSIGNMENTS—DEED OF ONE PARTNER FOR THE FIRM.—One partner, by the direction and consent of the other, can, in the name and on behalf of the firm, make a valid deed of assignment for the benefit of the firm creditors. *Blanke & Bro. Candy Co. v. Walker*, 482.

2. CREDITOR'S LIEN DERIVED THROUGH PARTNER'S RIGHT.—Each partner has a lien on the whole partnership effects and the right during the life of the partnership to have the effects applied to the discharge of partnership debts. This lien the partner can waive and does so by a sale; and there remains nothing through which the creditor can work out his right to a lien, which is wholly derivative by a sort of subrogation from the partner's lien. So where one of two partners sells by consent of his partner to a third person, to whom the remaining partner, in a short time, as contemplated in the making of the first sale, also sold his interest, a creditor of the firm has no lien and cannot in the absence of fraud follow the goods into the hands of such third party. *Tennant, Walker & Co. v. McKean*, 486.

3. ——— CUSTODIA LEGIS.—The partnership creditor's right is an administrative right, and can only be obtained by laying hold of the property and placing it in *custodia legis* as upon death, assignment, bankruptcy, insolvency or by attachment for fraud. *Ib.*

4. ——— REMEDY.—The partnership creditor as such has no more lien on partnership than the individual creditor has on individual effects, in case of a "going concern," until he puts his demand in judgment and seizes the property under execution before a *bona fide* disposition is otherwise made. *Ib.*

PASSENGER. See RAILROADS, 13.

PLATTSBURG. See MUNICIPAL CORPORATIONS, 4, 5.

PLEADING. See FORCIBLE ENTRY AND DETAINER, 5, 6.

1. MARRIED WOMEN—LIEN ON PRODUCTS OF SEPARATE ESTATE.—The separate property of a married woman, when it is sought to charge it with a lien under the statute, must be described in the petition, and, the separate estate being an indispensable element of the proceedings, must exist when the contract is made out of

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which the liability arises, and its existence must continue to the institution of the suit, and a petition failing to show these essential facts is fatally defective. *Osborne & Co. v. Graham*, 28.

2. Release procured through fraud.—A plaintiff, who has been induced by fraud or undue influence to release his right of action, may sue upon such right of action without first obtaining the annulment of the release by suit in equity; and if such release is pleaded as a defense to his action at law he may in his reply set up the fraud or undue influence in avoidance of it. *Girard v. St. Louis Car-Wheel Co.*, 79.

3. Exhibits—petition.—The exhibits filed along with a petition constitute no part thereof. Its sufficiency must be determined by its face—its contents—and can neither be aided nor destroyed by an accompanying exhibit. *Merrill v. The Central Trust Co.*, 236.

4. Contracts—modification—consideration—answer—practice.—By failing to deny under oath the execution of the contract declared on in the petition, its execution was admitted; and if defendant would rely on a new or modified contract subsequently entered into then he should set it up in his answer. The rescission, change or modification of the original contract could only be accomplished by a new agreement supported by a new consideration. *Ib.*

5. General denial—evidence.—The defendant by merely answering the allegations in the petition can only try such questions of fact as are necessary to sustain the plaintiff's case. If he intends to rely upon any matter which goes to defeat or avoid the plaintiff's action, he must set forth in clear and precise terms each substantive fact intended to be relied upon, else he will be precluded from giving evidence of it upon the trial. *Guinotte v. Ridge*, 254.

6. Special tax bill—general denial—Kansas City charter.—In an action to enforce a special tax bill under the charter of Kansas City, it is sufficient to plead the making and issue of the tax bill sued on, giving the date and contents thereof, and assignment thereof in case of assignment, filing the same, and allege that the party or parties made defendant own or claim to own the land charged, etc. The owner may plead in defense the imperfect character of the work, etc. Plaintiff does not have to allege or prove the work was well and faithfully done; and a general denial does not raise the question as to the character of the workmanship, which must be specifically alleged in the answer. *Ib.*

7. Slander — justification — mitigation — evidence. — Where neither justification nor mitigation is pleaded, evidence of mitigating circumstances is inadmissible. *Baldwin v. Fries*, 288.

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8. EVIDENCE—FOREIGN STATUTE.—When the action is not based on a foreign statute, it is unnecessary to plead it in order to introduce it in evidence. *Hatch v. Hanson*, 323.

9. SERVICE OF CHILD—ALLEGATION OF SERVANT—INSTRUCTION.—A petition of the father for the loss of services of an infant son, by reason of injuries received through defendant's negligence, is not fatally defective because it fails to allege specifically that said son is the servant of the plaintiff, when the relation of father and son, the infancy of the son, and the right of the father to the services of the son are fully set out. Such petition defectively states the plaintiff's title to his right of action, but does not wholly fail to state a title at all; an instruction on the same point is approved. *Buck v. The People's, etc.. Co.*, 555.

10. PRACTICE—CAUSE OF ACTION—OBJECTION—AIDER BY VERDICT. Both under the common law and the statute, when anything is omitted in the declaration, though it be matter of substance, if it be such that, without proving it at the trial, the plaintiff could not have had a verdict, and there is a verdict for plaintiff, such omission is no cause for arresting or reversing the judgment; and the rule is established in this state that, if material matter is not expressly averred, but is necessarily implied, the defect is cured by verdict. If, in such case, defendant pleads to the merits, he waives objection to mere formal defects, and will not be heard at the trial, or on appeal, to object that the petition does not state a cause of action, which objection can only be interposed when the petition wholly fails to state a cause of action. *Ib.*

POSSESSION. See BILLS AND NOTES, 5; EVIDENCE, 17, 18; REPLEVIN, 2; SALES, 7.

1. MARRIED WOMEN—POSSESSION OF WIFE'S REALTY—TERMINATION OF AGENCY.—A woman is married on one day, and her agent leases her land on the next day. Such lease conveys nothing, as the possession belongs to the husband, and the marriage terminates the agency. *Brown v. Miller*, 1.

2. RECORD—ATTACHMENT.—Though the mortgagee of chattels may not take possession, yet, if before the levy of an attachment the mortgage is filed for record, the lien thereof attaches in preference to the attachment. *Corning & Co. v. Rinehart Medicine Co.*, 16.

3. FRAUDULENT CONVEYANCES—PRACTICE—DEMURRER TO EVIDENCE. Though a demurrer to an interpleader's evidence might have been sustained, yet, if, as in this case, the subsequent evidence established the interpleader's possession of the attached goods, the finding must be for the interpleader, since possession made a *prima facie* case of ownership which was otherwise uncontradicted. *Baer, Seasongood & Co. v. Groves*, 245.

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POWER OF ATTORNEY. See CONSTRUCTION, 1.

PRACTICE, APPELLATE. See JURISDICTION, 2, 3.

1. RULES AS TO INTERFERENCE WITH VERDICT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—An appellate court cannot reverse, merely because the verdict is not altogether to its liking. It must defer to the jury in the first place, and then leave to the trial judge to say if the preponderance is so strong against the verdict that it should not stand. It can only interfere when the evidence or the inference therefrom are all against the finding, or there is such overwhelming preponderance against the verdict that it can only be accounted for on the ground of passion, partiality or prejudice. On the facts in this case the question of contributory negligence was properly submitted to the jury, the proof not being so clear and free from conflict that reasonable men, acting impartially, could only determine it in one way, and their finding is conclusive. *Davis v. The K. C. Belt Ry. Co.*, 180.

2. NEW THEORY ON APPEAL.—A party must stand or fall in the appellate court on the theory upon which he tried his case in the court below. *Witascheck v. Glass*, 209.

3. EVIDENCE—ABSTRACT.—The appellate court cannot pass upon the action of the trial court in refusing to admit in evidence certain letters when the abstract does not set forth the contents of such letters. And the appellate court will not go into and examine the transcript and fish out the matter which is necessary to a full understanding of the questions presented for decision. *Merrill v. The Central Trust Co.*, 237.

4. REVIEWABLE OBJECTIONS TO EVIDENCE—MOTION FOR NEW TRIAL. An objection to evidence, on the ground that it is immaterial, irrelevant, incompetent, improper or illegal, is so general that nothing is saved which can be reviewed by the revisory court. Objections to evidence must be specific, calling the court's attention to the particular ground thereof, and specific objection cannot be injected into the cause by the motion for a new trial, and in that way obtain recognition in the appellate court. *Clark v. The People's Collateral Loan Co.*, 248.

5. VERDICT—SET ASIDE—PREJUDICE—REASONABLE AMOUNT.—Where a verdict is the evident result of prejudice, partiality or mistake, and not of that calm and considerate weighing of the facts in evidence which should always characterize the deliberations of a jury, the appellate court will not hesitate to interfere; but, in order to do this, the testimony and surrounding circumstances must be such as to raise the strongest inference that such was the case. On the evidence in this case the amount of the verdict is deemed reasonable. *Duggan v. The Wabash Ry. Co.*, 266.

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6. ——— RULE OF INTERFERENCE—EVIDENCE. Whenever, from all the facts and circumstances in evidence, a jury may, without violence of the dictates of reason and common sense, infer a fact on account of its known relation to the facts proved, the court shall not interpose its own different conclusion. The evidence in this case is reviewed in the light of the above and other rules in relation to interference with verdicts, and is found sufficient to sustain the verdict in this case. [ELLISON, J., *dissenting* in a separate opinion.] *Ib.*

7. AMENDMENT—DISCRETION OF TRIAL COURT.—The statutes in relation to amendments are liberal; and appellate courts will not interfere with the discretion of the trial courts, except in case of manifest abuse; especially, where the amendment is immaterial, and the court offered to continue the cause, and the defendant elected to proceed. *Collins v. Glass*, 297.

8. BRIEF—POINTS AND AUTHORITIES.—Rule 15, which is founded on the statutes, requires appellant to file a brief containing in numerical order the points or legal propositions relied on, with citations of such authorities as counsel desire to present in support thereof; and when authorities are cited without any designation of the point, or legal proposition, that they are intended to support, the brief is subject to objection, *Hatch v. Hanson*, 323.

9. ADMISSION OF IRRELEVANT EVIDENCE—PREJUDICIAL ERROR.—The admission of irrelevant evidence is not necessarily prejudicial error; whether it is so depends, to a great extent, upon the probability of its having brought about or affected the finding. And *held*, that the admission of such evidence necessitated a reversal of the judgment in the cause at bar, which was one for the breach of contract, since it tended strongly to show that an accurate view had not been taken by the trial court of the obligations of the contract alleged to have been violated. *Barngrover v. Maack*, 407.

10. REVIEW OF DISCRETIONARY RULINGS.—The exercise of this power addresses itself to the sound discretion of the circuit court, and the refusal of that court to set aside its affirmance of the justice's judgment may, therefore, be reviewed and corrected on appeal, when a strong case for setting aside the affirmance is presented. *Vastine v. Bailey*, 413.

11. NO EVIDENCE—CIRCUMSTANCES—DEFERRING TO TRIAL JUDGE. While all the oral evidence may be inconsistent with defendant's guilt, yet, if circumstances tend strongly to support the trial court's finding, the appellate court will defer to such finding. *Plattsburg v. Trimble*, 459.

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12. REVIEW OF LAW AND FACTS.—An appellate court has only power to review the law declared by the court below, and, when the court is intrusted with both law and facts, it must assume the facts to be as the court found them, as it is not in its province to review the general finding of courts in law cases. *Griffith v. The K. C., etc., Co.*, 539.

13. OBJECTION NOT URGED BELOW.—Objections not urged below against the admission of evidence will not be considered on appeal. *Watson v. Race*, 546.

14. ASKING INSTRUCTIONS—BILL OF EXCEPTIONS.—Instructions should be asked before the cause is submitted to the jury, or the court sitting as a jury, and, if asked afterwards, they are out of time, and the court can rightfully refuse to consider them; and where the bill of exceptions, which to the appellate court imports absolute verity, show instructions were first presented after the announcement of the court's finding, the appellate court will not review the action of the trial court in declining to pass upon them. *Ib.*

15. EXCEPTION—MOTION FOR NEW TRIAL.—The appellate court is precluded from reviewing an action of the trial court to which no exception was saved, and to which the attention of the court was not called in the motion for a new trial. *Ib.*

16. DISTURBING FINDING.—Where there is ample testimony in the record to sustain the finding, the judgment will not be disturbed. *Ib.*

17. PROVINCE OF APPELLATE COURT—DISCRETION OF TRIAL COURT. In this state it is incontrovertibly established by decisions of all the appellate courts, that they are empowered, by virtue of their superintending control over inferior courts, on appeal or writ of error, to review and interfere with the discretion of such inferior courts in setting aside their findings, verdicts and judgments, in those cases where it is affirmatively shown that their action was illegal, because in contravention of some statute, or when oppressively or abusively exercised, or when their discretion has been unjudicially exercised. *Carr v. Dawes*, 598.

18. ——— ———. There are two kinds of discretion reposed in the trial courts of general jurisdiction, one is limited by rules or principles of law; the other is absolute and exists where no fixed or certain rule of law can apply. The former is reversible, the latter is not, and from the nature of the case cannot be. *Ib.*

19. ——— ——— SETTING ASIDE JUDGMENT BY DEFAULT—COMMON LAW—STATUTE.—By common law the granting a new trial or setting aside a judgment by default rested in the absolute discretion of the trial court and was not reviewable, and, while the common law as to new trials has been superseded by statute, yet no statute seems to have touched the power and discretion over judgments by default. *Ib.*

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20. ——— ——— SETTING ASIDE V. REFUSING TO SET ASIDE A JUDGMENT.—There is a distinction between setting aside a judgment and refusing to set it aside. In the former case, the plaintiff is without remedy; in the latter, error will lie in behalf of the defendant. *Ib.*

21. NEW TRIAL—WEIGHING THE EVIDENCE.—This court will not grant a new trial on the ground that the verdict is against the weight of the evidence, though the trial court may properly do so. *Watson v. Stromberg*, 630.

22. REMITTITUR—EXCEPTIONS.—The propriety of a voluntary *remittitur* by a plaintiff of a part of the damages assessed by the verdict cannot be reviewed on appeal, unless an exception was taken by the defendant to the action of the trial court in permitting the *remittitur* to be made. *Zurfluh v. People's Ry. Co.*, 636.

23. JUDGMENT ON APPEAL.—*Held per curiam* that a judgment simply of a reversal should be entered on the appeal of a cause, wherein the trial court ought to have non suited the plaintiff, but failed to do so, and that such judgment of reversal was equivalent merely to a nonsuit, and, therefore, not a bar to another action. *Ib.*

24. ———. But held by BIGGS, J., *dissenting*, that in such case the judgment should be reversed and the cause remanded for another trial, unless the evidence warranted a final judgment by the appellate court for the appellant. *Ib.*

25. FAILURE OF APPELLANT TO FILE MOTION FOR NEW TRIAL IN TIME. If an appellant fails to file a motion for new trial within the requisite time, only errors which appear on the face of the record proper can be noticed on the appeal. *Bauer v. Barnett*, 654.

PRACTICE, TRIAL. See ASSIGNMENT, 7; PLEADING, 4.

1. LIEN ON PRODUCTS OF SEPARATE REALTY--PRACTICE--RECEIVER OR INJUNCTION.--In order to continue the *res* so that the same may be subject to a lien, the creditor may invoke the appointment of a receiver or the aid of an injunction. *Osborne & Co. v. Graham*, 28.

2. CONTRIBUTORY NEGLIGENCE—PLEADING—DIRECTION OF THE COURT.—When the inference of contributory negligence arises from the plaintiff's own testimony, the defendant may take advantage of it, regardless of whether such special defense be pleaded or not; and when such contributory negligence is shown as defeats plaintiff's right of action and disproves his case, it is the duty of the court to declare the result to the jury as a matter of law. *Warmington v. The Atchison, T. & S. F. Ry. Co.*, 159.

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3. FRAUDULENT CONVEYANCES—POSSESSION—DEMURRER TO EVIDENCE.—Though a demurrer to an interpleader's evidence might have been sustained, yet, if, as in this case, the subsequent evidence established the interpleader's possession of the attached goods, the finding must be for the interpleader, since possession made a *prima facie* case of ownership which was otherwise uncontradicted. *Baer, Seasongood & Co. v. Groves*, 245.

4. MASTER AND SERVANT—DISCHARGE—EVIDENCE IN REBUTTAL.—In an action for breach of contract in discharging the servant without cause, the master set up the incompetency and drunkenness of a servant as a defense, and this evidence tended to show that the servant was drunk most all of the time. It was proper, therefore, for the servant to show in rebuttal by witnesses that the plaintiff was sober at such times as they saw him. *Collins v. Glass*, 297.

5. ——— VARIANCE.—This suit was to recover wages due under the contract; and there was no room for the application of the rule that there can be no recovery on a contract other than that declared on. *Ib.*

6. VERDICT—SMALL FINDING NOT PREJUDICIAL ERROR.—The fact that the amount of the verdict might have been greater, under the evidence, is not prejudicial to the defendant in this case. *Ib.*

7. REPLY, WHEN FILED.—There was no error in this case in permitting the plaintiff to file his reply after he had rested his case on the evidence. *Ib.*

8. BILL OF DISCOVERY—PARTY AS WITNESSES—CONTEMPT—PLEADING STRUCK OUT.—Though the bill of discovery as known to the old chancery practice is abolished, yet, under the statute, a party to a civil action may compel the adverse party to testify as a witness, and if he, on being duly commanded, refuse to attend and testify either in court or before any person authorized to take his deposition, besides being punished himself for contempt, his petition, answer or reply may be rejected, and judgment rendered against him. *Carr v. Dawes*, 351.

9. CONTEMPT—SETTING ASIDE JUDGMENT—DISCRETION OF TRIAL COURT.—While, as regards the contempt, the matter is wholly between the court and the contemptuous party, and the court may, in the exercise of its discretion, set aside its judgment, such discretion is the subject of review; but the party seeking to vacate such judgment must show it was either illegal, or else that it should be set aside because the court's discretion was oppressively exercised. *Ib.*

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10. **Motion to set aside judgment—diligence and merits.**—Plaintiff sued defendant on a promissory note; the defense was the statute of limitations. The reply was an avoidance of the statute. Plaintiff had two subpœnas served upon defendant, who did not appear at the trial, either in person or by attorney. Thereupon the court struck out his answer and rendered judgment. Fifty-six days after at the same term, defendant filed an affidavit to set aside the judgment on the ground that pressure of business prevented his attendance, without stating the business and its nature, but alleging his defense was good in law and fact. The affidavit of his attorney also filed stated he was attending to his duty in the legislature, and had at a prior term agreed to continue the cause, and had, therefore, not notified defendant he would be absent. The court sustained the motion, and set aside the judgment: *Held*, error, as it is the duty of the courts to so construe pleadings, and to so adapt the practice as to discourage negligence, deceit and delay; and such applications should show merit as well as diligence, and the statute of limitations is a technical and not a meritorious defense. *Ib.*

11. **Stipulation—depositions.**—A stipulation filed in this cause was to the effect, that a deposition taken in another action might be read in this cause with the same force and effect as if taken upon proper notice. *Held*, that this stipulation waived no right of either party in reference to the deposition, except the right of objection for want of notice, and did not entitle either party to read the deposition against the objection of the other party, if the witness was present at the trial. *Schmitz v. The St. Louis, etc., Ry. Co.*, 380.

12. **Excessive verdict.**—If a verdict is excessive under the instructions given by the court, the objection thereto on that ground will not be overcome by the fact that the instructions were erroneous, and that the verdict is not excessive under a correct rule as to the measure of damages. *Ib.*

13. **Remittitur of damages.**—Where the damages are capable of being definitely determined by an exact money standard, a *remittitur* is permissible for the purpose of obviating an excessive assessment of the same by the verdict of the jury. *Ib.*

14. **Objections to evidence.**—Objections to the admissibility of evidence are waived unless they are made at the time of the offer of the evidence; but the right to object to evidence, on the ground that it fails to substantiate the plaintiff's claim in a material respect, is not lost by the failure to object to its admissibility. *Bruns v. Capstick*, 397.

15. **Witnesses—calling upon opposite party to testify—depositions.**—If one party calls upon the other to testify, or reads in evidence a deposition taken by the opposing party, he in either case vouches for the credit of the witness. *Bensberg v. Harris*, 404.

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16. Actions for personal injuries—remittitur.—*Semble* that, in an action wherein the damages are incapable of measurement by an exact money standard, such as actions for personal injuries, the defendant's right to object to the verdict as excessive cannot be obviated by a *remittitur* by the plaintiff of a part of the damages assessed. *Zurfluh v. The People's Ry. Co.*, 636.

17. Inconsistent positions.—When a consignor sues a carrier for a loss of the goods carried, and predicates his claim upon the theory that the transit was to end at a given point, and, therefore, lay wholly within a certain state, the defendant carrier is not precluded from claiming that he had carried the goods to said point, and had ceased to hold them as a carrier, by the fact that he had pleaded in his answer that the transit contracted for extended beyond said point and state. *Bennett v. Mo. Pac. Ry. Co.*, 656.

18. Inconsistency of verdict.—A verdict which is inconsistent in its several findings cannot stand, unless it appears that the party objecting to it has not been prejudiced. And *held*, accordingly, that the verdict in this cause could not stand, since by it the jury found for the plaintiff in a count for damages for the non-performance of a contract, and at the same time found for the defendant for the full contract price on a counterclaim, based upon the same contract. *Johnson v. Labarge*, 433.

19. Demurrer to evidence.—In passing upon a demurrer to the evidence the court should make every inference of fact in favor of the party offering the evidence which the evidence warrants, and which a jury might with any degree of propriety have inferred; the evidence in this case is reviewed and *held* sufficient to be submitted to the jury. *Field v. The Mo. Pac. Ry. Co.*, 447.

20. Contract—quantum meruit—instructions.—Where, on the trial in the circuit court of an action instituted before a justice of the peace, there are instructions on the theory of a special contract, and the jury found for the plaintiff on such theory, no injury resulted to the defendant from giving an instruction on the theory of a *quantum meruit*, there being no evidence of the reasonable value of the services, sued for. *Lemon v. Lloyd*, 452.

21. Special finding—what is not—duty of court.—At the conclusion of the evidence, the judge stated his opinion of the facts, and what the evidence conduced to show, and what the judgment should be. *Held*, not to be a special finding. It is no more the duty of the court now, than under the code of 1855, to make a special finding of facts in a cause tried by it, unless one of the parties thereto request it with the view of excepting to the decision of the court upon the question of law or equity arising in the case, in which case the court is required to state in writing the conclusions of facts found separately from the conclusions of law. *Griffith v. The K. C., etc., Co.*, 539.

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22. ASKING INSTRUCTIONS—BILL OF EXCEPTIONS.—Instructions should be asked before the cause is submitted to the jury, or the court sitting as a jury, and, if asked afterwards, they are out of time, and the court can rightfully refuse to consider them ; and where the bill of exceptions, which to the appellate court imports absolute verity, shows instructions were first presented after the announcement of the court's finding, the appellate court will not review the action of the trial court in declining to pass upon them. *Watson v. Race*, 546.

23. REPETITION OF INSTRUCTION.—Where an instruction is but a repetition of one given it is properly refused. *Kendall Boot & Shoe Co. v. Bain*, 581.

PRESUMPTIONS. See COURTS, 3.

PRINCIPAL AND AGENT.

1. MARRIED WOMEN—POSSESSION OF WIFE'S REALTY—TERMINATION OF AGENCY.—A woman is married on one day, and her agent leases her land on the next day. Such leave conveys nothing, as the possession belongs to the husband and the marriage terminates the agency. *Brown v. Miller*, 1.

2. AGENT—AUTHORITY OF TRAVELING SALESMAN.—A sale of goods made by a traveling salesman is not binding upon his principal, if it appears from the uncontradicted evidence that he was authorized merely to solicit or take orders for the goods, subject to the approval of the principal ; and the instructions given to him by the principal are conclusive of the scope of his agency, if not enlarged by the ratification of the exercise of greater authority. *Bensberg v. Harris*, 404.

3. LIABILITY OF PURCHASER FROM AGENT.—One who purchases goods from an agent, knowing or having good grounds for believing, that, in selling them, the agent is exceeding his authority and acting in fraud of his principal, obtains no title, but is guilty of a conversion of the goods. *The White Sewing Machine Co. v. Betting*, 417.

4. COMMISSION FOR SALE OF REAL ESTATE.—If a real-estate agent procures a purchaser ready, willing and financially able to make the purchase absolutely on the terms fixed by the principal, and the latter accepts the buyer and enters into a contract with him respecting the sale and purchase of the property, he establishes a *prima facie* right to his commissions. *Lemon v. Lloyd*, 452.

5. EVIDENCE—AGENT GIVING PURCHASER PART OF COMMISSION NO DEFENSE.—The fact that the agent agreed to give the purchaser a part of his commissions if he would close the trade cannot injure the principal, and is not admissible in evidence to defeat an action for the agent's commissions. *Ib.*

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6. COMMISSIONS — EVIDENCE — PERFECTING TITLE — DEFENSE.—The mere fact, that the purchaser produced by the agent at the time of making the contract of purchase knew that there were some proceedings in the probate court required to perfect the title, is not admissible in evidence, unless followed by the further offer to show what the proceedings were and the time required to secure them, so that the jury could determine whether defendant had perfected the title in a reasonable time; and such fact cannot defeat the agent's action for his commissions, where the purchaser produced was able and willing and was accepted and contracted with by the principal. *Ib.*

7. EVIDENCE—DECLARATIONS OF AGENT.—A party cannot be bound by any statement or admission of a person not his agent in the matter referred to at the time; and while the fact that one has been acting as agent of defendant is competent to show a general agency, it is incompetent if it is sought thereby to show agency in another matter with a view to infer such agency in the matter in controversy. *Watson v. Race*, 546.

8. LIABILITY OF AGENT ACTING WITHOUT AUTHORITY.—An agent who undertakes to bind his principal when in fact he has no power to do so is responsible to the other contracting party for the damages occasioned by the non-performance of the contract; and this is so whether he acts in good faith or not. *Gestring v. Fisher*, 603.

9. ——— AGENCY FOR THE SALE OF REALTY.—This rule applies to an agent for the sale of realty who has no authority in writing to sell the realty, and whose principal refuses to execute a contract of sale made by him. But, in the absence of an express agreement to the contrary, such agent merely undertakes to bind the interest of his principal in the realty, without warranty of title. *Ib.*

10. ——— ——— MEASURE OF DAMAGES.—The mere fact that such agent has undertaken to sell realty in the name of his principal, without legal authority to bind such principal, does not render him responsible for any defect in the title of the principal. In the absence of evidence of other damages, the measure of the agent's liability to the purchaser in such case is the excess of the market value of the principal's title, whether good or bad, over the contract price. *Ib.*

11. ADMISSIBILITY OF DIRECTIONS FROM THE PRINCIPAL TO THE AGENT AS EVIDENCE OF THE LATTER'S AUTHORITY.—In an action wherein a principal is sought to be held upon a contract made for him by an agent, his instructions to the agent are always admissible as evidence of the extent of the agent's actual authority, if the extent of that authority is an issue in the case, and, therefore, a disputed claim of estoppel will not render such evidence inadmissible. *Ib.*

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PRINCIPAL AND SURETY. See MARRIED WOMAN, 9.

1. DISCHARGE—ESTOPPEL.—A creditor, who on being informed by one of his debtors known to be a surety, that the debt can be made of the principal, and that he is unwilling to remain longer liable, replied that the debt was about to be secured, and, if security was given, the time would be extended; but, if not given, suit would be brought, and the surety should take no further action in the matter, and later informed the surety the matter was arranged, is estopped to further hold the surety. *Triplett v. Randolph*, 569.

2. ——— WAIVER OF WRITTEN NOTICE TO SUE.—If a creditor, knowing one of his debtors to be a surety for the other, and that he is about to give him legal notice to bring suit, by his conduct prevents the notice from being given, which, if given and acted upon, would have caused the bringing of the suit and the collection of the note, discharges the surety, though no suit is brought, and the principal becomes insolvent. *Ib.*

PROBATE COURTS. See ADMINISTRATION; COURTS, 1, 2.

PROFESSIONAL SERVICES.

1. TEACHERS—IMPLIED CONTRACT.—It is a rule applicable to every learned profession, and, therefore, to that of teaching, that he, who is engaged in the practice of it and is employed to render services appertaining to it, undertakes, in the absence of a special contract, to exercise a reasonable degree of skill and judgment and ordinary care and diligence in the rendition of such services. *Barngrover v. Maack*, 407.

2. ——— EXTENT OF IMPLIED OBLIGATION.—This being the extent of the implied obligation, one who contracts to give instruction in specified studies does not warrant that he will pursue the best methods of study. *Ib.*

3. ——— SCHOOLROOM ACCOMMODATIONS.—But a teacher, who undertakes to furnish schoolroom accommodations, impliedly contracts that those furnished will be reasonably fit for the purposes for which they are intended. *Ib.*

4. ——— PROSPECTUS.—The proprietor of a private school published a prospectus, in which he stated that the entire tuition would consist of three terms, and set forth the branches of study to be pursued during the first term of his school, and the course and extent of study and the number of lessons per week in each branch. *Held*, that he thereby undertook to instruct his pupils in each of the branches thus enumerated, but that the amount of instruction in each was, within reasonable limits, taking into consideration the time allotted for the entire course, left to his own judgment. *Ib.*

PROXIMATE CAUSE. See NEGLIGENCE, 16, 17.

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PUBLIC ROADS. See HIGHWAYS.

QUANTUM MERUIT. See CONTRACTS, 4.

1. IMPLIED PROMISE IN THE ABSENCE OF INTENTION—DURESS OR FRAUD.—The law implies from men's conduct and actions contracts and promises as forcible and binding as those made by express words, and such contracts are implied sometimes in the furtherance of the intention, or presumed intention, of the parties, and sometimes in furtherance of justice, without regard to the intention of the parties. And a promise to pay for services rendered or money obtained will be implied against the wrongdoer, who never intended to pay, or intended deceitfully to avoid payment; and whether labor is security through duress, compulsion or fraud can make no difference. *Hickam v. Hickam*, 496.

2. ——— IGNORANCE OF LAW—MAXIM—FRAUD—SLAVE.—The maxim, *ignorantia legis neminem excusat*, is relaxed in cases of imposition, misrepresentation, undue influence, misplaced confidence and surprise; as if a girl born and raised a slave, ignorant, unable to read, and for a series of years kept under a strict surveillance and in utter ignorance of her emancipation and right to her own labor, and taught to believe she was still the property of her old master, should continue to work for her old master without intention to receive pay on her part, or to give on his part, her ignorance of her legal rights would not defeat her action for such work and labor, brought after she learned of the fraudulent suppression. *Ib.*

3. ——— GROUND OF RECOVERY—INSTRUCTIONS.—In an action by such girl against her old master for services, she must recover, it at all, regardless of the intention of one or the other, for the reason, and that alone, that she was induced by the conduct of her old master to render services for him under the belief that she owed him such labor as his slave. Instructions set out in the opinion reviewed and criticised. *Ib.*

4. LIMITATION—FRAUD.—Where a girl, born a slave, has by the fraudulent conduct of her old master been induced to continue to labor for him in ignorance of her rights for twenty-four years after her emancipation, the cause of action for such services, if any there is, accrues on the discovery of the fraud, her claim is an entirety for the whole, and the five years' limitation does not apply to bar all but the last five years' service. *Ib.*

RAILROADS. See MASTER AND SERVANT, 5, 6; NEGLIGENCE, 6, 7, 8, 17, 18, 19, 20.

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—DEMURRER TO THE EVIDENCE—CARELESSNESS AFTER KNOWLEDGE OF PERIL.—If without dispute it appears that plaintiff entered upon the railroad track immediately in front of the moving car, so close thereto

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that even with the greatest care defendant's servants were powerless to avert the injury, then plaintiff's carelessness would preclude his recovery and a demurrer to the evidence should be sustained; but in this case, while defendant's evidence tended to prove this state of facts, yet there was testimony tending to sustain the claim that plaintiff stood upon the track upon which the train was approaching, long enough prior to the accident, and far enough away from the coming train, for those operating the same, by the exercise of ordinary care, to discover his peril in time to have stopped the train before striking the plaintiff, which, if true, will entitle plaintiff to recover, even though he was negligent in entering and stopping upon the track, and, therefore, the demurrer to the evidence was properly overruled. *Duncan v. Mo. Pac. Ry. Co.*, 198.

2. ——— FLAGMAN — CONTRIBUTORY NEGLIGENCE — INSTRUCTION. The fact that an ordinance requires a railway company to keep a watchman, whose duty it is to warn persons about to cross the tracks of approaching trains, does not absolve such persons from a like duty of ordinary care when crossing such place of danger; they are bound to use their senses, and do all a prudent man, under the circumstances, would do to avoid danger. Where a person approaching such place of danger notes the absence of such watchman, sees the moving train by which he is subsequently hurt, and has notice of all the absent watchman could have imparted to him, and voluntarily puts himself in a place of danger, he cannot charge his misfortune to any omission of duty by the watchman. An instruction set out in the opinion is disapproved. *Ib.*

3. ——— ——— COMBINED NEGLIGENCE—PROXIMATE CAUSE.—In this case the alleged negligence of the watchman in failing to warn plaintiff of the approaching train was prior in point of time to the negligent acts of plaintiff, and there is no room for the application of the rule, that where plaintiff is put in danger by the combined acts of plaintiff and defendant, and defendant sees, or by ordinary care could see, the peril of the plaintiff in time to avoid the danger, then plaintiff may recover; but plaintiff's negligence in going on the track being the approximate cause, the other rule applies, that to make a defendant liable for an injury, when plaintiff has been also negligent, it should appear that the proximate cause of the injury was the omission of the defendant, after becoming aware of the danger to which plaintiff was exposed. *Ib.*

4. NEGLIGENCE—HIGHWAY.—A railway company, whose tracks cross a public highway, and whose cars stand disconnected upon the highway, with a space between them sufficiently large to permit persons to pass through it, is guilty of negligence, if it closes this space suddenly and without warning to the traveling public; and, in the case of such negligence, it is liable for

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the injury thereby caused to a person, who, without contributory negligence on his part, climbs over the drawhead of a car instead of passing through the open space. *Schmitz v. The St. Louis, etc., Ry. Co.*, 380.

5. ——— ——— CONTRIBUTORY NEGLIGENCE.—The person thus injured, who was a boy only nine years old, testified that he climbed over the drawhead instead of passing through the open space, because he would get mashed if he passed between the cars. *Held*, that this remark did not conclusively show that he appreciated the danger of his act, because his testimony taken as a whole, rendered the inference permissible that this remark was made in the light of subsequent events, and not because he anticipated what happened. *Ib.*

6. SIGNALS AT CROSSING—PLEADING—OWNER.—In an action against a railroad corporation to recover the statutory penalty for failing to give the statutory signals at a public road crossing, it is sufficient to allege that defendant "has been operating and running" the railroad in question, whether defendant had been operating such railroad as owner, lessee or otherwise, the requirement of "owner," under the statute, has been fulfilled. *The State to use, etc., v. The St. J., etc., Ry. Co.*, 466.

7. ——— OWNER—EVIDENCE.—The evidence examined and *held* sufficient to hold the defendant as operator of railroad in question. *Ib.*

8. ——— EVIDENCE OF PUBLIC ROAD.—Where the evidence tends to show that the public road has been traveled and worked from ten to fifteen years, it is a sufficient showing of a "traveled public road" named in the statute requiring signals at public crossings. *Ib.*

9. OPEN GATE—STATUTE—COMMON LAW.—A complaint against a railroad company alleged that the defendant negligently and wrongfully permitted to be and remain open a certain gate in a railroad fence, whereby a certain cow of plaintiff's entered upon defendant's railroad and was killed. The proof showed the gate, some sixty yards from the right of way, had been put in for its own use by a coal company, whose land abutted upon the right of way, and there was no fence between the coal land and the right of way. *Held*, plaintiff can predicate no right to recovery against defendant upon its failure to keep the gate of the coal company closed, since the statute imposed no such duty, and the common law does not require a railway company to fence its right of way. The theory of an instruction set out in the opinion *held* not warranted by the statute. *Davis v. Wabash Ry. Co.*, 477.

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10. Killing stock—negligence.—Where the evidence fails to show that the engineer in charge of the train ever saw the cow sued for, before he struck her, or that after seeing her, if suc was the fact, the train could have been stopped with safety before striking her, but, on the contrary, shows the collision was almost simultaneous with her getting on the track in an attempt to cross before the engine, there can be no recovery. *Ib.*

11. Common carriers—liabilities beyond its line—statute. Under section 944, Revised Statutes, 1889, a railway carrier receiving goods in this state to be shipped over its own and connecting lines to the point of destination, may stipulate in the contract of shipment against damages to the goods occasioned by the negligence of the connecting carrier. The opinion follows *Dimmitt v. Railroad*, 103 Mo. 433, and discusses prior cases overruled thereby. *Hill v. Mo. Pac. Ry. Co.*, 517.

12. Negligence—contributory negligence—demurrer to evidence—instruction.—A six-year-old boy was permitted by the driver and conductor of a street car to ride on the front platform of the car, and to undertake to alight from said platform, and, while in the act of so alighting, by a sudden lurch forward he was thrown off and under the car and injured. *Held*, a sufficient statement of fact to go to the jury on the question of negligence, in an action by the father for the loss of service; and that the father's consent for the son to ride upon defendant's car is not such contributory negligence as to take the case from the jury, as such consent is not the direct and proximate cause of the injury. An instruction ignoring contributory negligence approved. *Buck v. People's, etc., Co.*, 555.

13. ——— child—authority of driver—fare—passenger—presumption. *Held, arguendo:*

(1) Negligence cannot ordinarily be imputed to a six-year-old child.

(2) It is within the scope of the employment of a driver who is also a conductor to receive passengers on the car; and to let them off.

(3) The omission of the driver to demand or collect fare could not affect the boy's *status* as a passenger or his right to the exercise of the highest possible degree of care and vigilance in the conduct and management of the car; and defendant would be liable for the slightest negligence.

(4) If the plaintiff consented to his son accepting the invitation of the defendant's driver to ride upon the car, the former had the right to presume that the driver would assign his son to some safe place in the car, instead of

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needlessly exposing him to the risk and peril of riding on, and getting off, the front platform. Presumptions as to comparative safety of the public streets and street-cars for children are mentioned in the opinion. *Ib.*

14. COMMON CARRIERS—WHEN LIABILITY ATTACHES—DELIVERY OF GOODS.—If goods are delivered to a railroad company for transportation without more, the liability of the carrier attaches, and this means an insurance, a responsibility for every loss, save only such as result from the acts of God or the public enemy; but, if the delivery is for storage for a certain or indefinite time, the carrier becomes a mere depository or bailee until the appointed time has expired. *Gregory v. Wabash Ry. Co.*, 574.

15. SAME.—A delivery to the carrier with the name and address of the consignee marked upon the goods is, in the absence of some directions or agreements otherwise, equivalent to an express direction to transport them to such consignee *at once;* and, on a review of the testimony in this case, it is *held*, there is some evidence tending to prove a delivery for immediate shipment and amply justifying a submission of the case to the jury. *Ib.*

16. NEGLIGENCE—EVIDENCE.—*Held* that the evidence in this cause, which was one for damages occasioned by a collision with a street railway car, did not warrant the submission of the cause to the jury, since the right of recovery was predicated on the theory that the defendant's driver could have stopped the car in time to avert the injury after he saw, or by the exercise of ordinary diligence could have seen, the perilous position of the plaintiff, and since there was no evidence whatsoever of the space within which the car could have been stopped. *Zurfluh v. People's Ry. Co.*, 636.

RECEIVER. See MARRIED WOMEN, 4.

RECORDS. See COURTS, 3.

RELEASE.

1. SUFFICIENCY OF EVIDENCE OF FRAUD.—A release of a right of action stands upon the footing of a compromise, and should be upheld when fairly made. It should not be vacated for fraud in an action at law, unless the evidence of the fraud, if believed, and the circumstances attending its execution are such as would warrant a chancellor in setting it aside. And *held*, that the evidence in this cause was sufficient under this rule. *Girard v. St. Louis Car-Wheel Co.*, 79.

2. FRAUD—UNUSUAL PROVISIONS IN A RELEASE.—An unusual provision in an instrument, whereby the draftsman of the instrument obtains an advantage over the other party, excites suspicion of a fraudulent motive. This rule is applied herein to a provision in the release of a cause of action, stating that the party making the release agreed to release "deliberately, of his own free will, and without any undue influence from anyone." *Ib.*

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3. ——— RESCISSION OF CONTRACT—RESTORATION OF BENEFITS RECEIVED.—If a party to a contract seeks to have it annulled, because he was induced to enter into it by fraud, he must ordinarily restore to the other party the consideration received by him under it; but he is not bound to restore such consideration where the contract consists of the release of a cause of action on his part, and the consideration received was less than what is due him for such cause of action. *Ib.*

4. ——— ———. If a party to a contract does not labor under a disability or infirmity, his mere failure, through his own fault or neglect, to read it or inform himself of its contents, is not sufficient to annul it or overcome its legal effect as to him. *Ib.*

5. FRAUD—RESCISSION OF CONTRACT.—Where a contract has been obtained by fraud, the defrauded party may rescind it without the aid of any court, if he acts promptly after the discovery of the fraud; but in such case he must return, or offer to return, whatever of value he has received on account of such contract. And this rule is applicable to the compromise and release of a disputed claim for less than its amount, such as the release of a controverted claim for personal injuries for much less than the amount of the actual damages. [*Per Biggs, J., dissenting.*] *Ib.*

REMEDY. See MARRIED WOMEN, 4; PARTNERSHIP, 4.

REMITTITUR. See DAMAGES, 9; JURISDICTION, 1; PRACTICE, APPELLATE, 22; PRACTICE, TRIAL, 16.

REPEAL. See DRAMSHOPS, 2.

REPLEVIN.

1. EVIDENCE—WRIT OF ATTACHMENT—STRANGER—INSTRUCTION.—In an action of replevin against a sheriff holding under a writ of attachment by a stranger to the attachment proceeding, the sheriff cannot make a *prima facie* case or question the title of the plaintiff by producing the attachment writ with his levy thereon and the proof of the debt, but must go further and show that the petition, affidavit and bond, as required by the statutes, were filed in a court of competent jurisdiction before the issue of his writ; and it is error to tell the jury that the production of the writ and the levy thereunder was sufficient to entitle the sheriff to the possession of the goods, unless the plaintiff should, by a preponderance of the evidence, show that he was the owner of the goods at the time of the seizure. *Kendall Boot & Shoe Co. v. Bain*, 581.

2. COMMON LAW—FRAUDULENT CONVEYANCES.—At common law the only things essential to a valid sale of personal property were a proper subject, a price, and the consent of the contracting parties, and, when these concurred, the sale was complete, and the title passed, without anything more, except, where the thing sold was part of a mass, it had to be separated; the statute of

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fraudulent conveyances beginning where the common law stopped requires that the transaction, before considered complete so as to effect a change in ownership, should be accompanied by a delivery in a reasonable time, regard being had to the situation of the property, and be followed by an actual and continual change of the possession of the thing sold, and an instruction which goes further than the statute is *held* improper and misleading. *Ib.*

3. VALUE AT TIME OF TRIAL.—If the defendant prevails in replevin, the value of the goods should be assessed at the time of trial, and not at the time of caption. *Ib.*

RESCISSION. See CONTRACT, 3; FRAUD, 2, 3, 4; PLEADING, 4; RELEASE, 2, 3, 4.

ROADS. See HIGHWAYS; RAILROADS, 8.

SALES.

1. WARRANTY OF TITLE—EVIDENCE—CONVERSATION.—Plaintiff sued upon an implied warranty of title in the sale of a typewriter; defendant's contention was that it had given an option on the typewriter to A. who, before the time expired, sold it to plaintiff. It was undisputed that plaintiff gave his check to A., and, on his indorsement thereof to defendant, the latter paid him the difference between its price to him and his price to plaintiff. *Held*, the conversations between A. and defendant's agent—all the verbal acts of the parties connected with the transaction—should have been admitted in evidence to enable the jury to determine the question as to whom the sale was made by the defendant. *Clark v. People's Collateral Loan Co.*, 248.

2. ——— INSTRUCTIONS—ISSUES.—Instructions set out in the opinion are criticised, since they nor any other instruction informed the jury what the issues were, and ignored the essential and constitutive fact that they must find that plaintiff had surrendered the typewriter to a person having a paramount title thereto. *Ib.*

3. FAILURE TO DELIVER—MEASURE OF DAMAGES.—Upon the seller's failure to deliver the goods according to contract, the ordinary measure of damages is the difference between the contract price and the market price of the goods at the time when, and the place where, they should have been delivered. *Griffith v. K. C. etc., Co.*, 539.

4. DELIVERY — INSTRUCTIONS — LAW AND FACTS.—An instruction should not submit to the jury a question of law and fact; and, when the question submitted relates to a sale and delivery of the goods, the court should outline what facts constitute a sale and delivery, and leave it to the jury to say whether the evidence proved these facts. An instruction as asked, and as modified, is passed upon. *Kendall Boot & Shoe Co. v. Bain*, 581.

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5. BILL OF SALE — DELIVERY — TITLE.— The title of goods and chattels passes with the delivery of possession under a contract of purchase. A bill of sale subsequently executed is merely evidence of a transfer of title, and not necessary to its completion; and, in this case, the jury should have been informed as to the effect of the bill of sale. *Ib.*

6. ASSENT OF PARTIES—INSTRUCTION.—The assent of parties to a sale may be expressed or implied from their language, conduct or silence, etc., and, in this case, it was error not to so instruct the jury. *Ib.*

7. COMMON LAW—FRAUDULENT CONVEYANCES.—At common law the only things essential to a valid sale of personal property were a proper subject, a price, and the consent of the contracting parties, and, when these concurred, the sale was complete, and the title passed, without anything more, except, where the thing sold was part of a mass, it had to be separated; the statute of fraudulent conveyances beginning where the common law stopped requires that the transaction, before considered complete so as to effect a change in ownership, should be accompanied by a delivery in a reasonable time, regard being had to the situation of the property, and be followed by an actual and continual change of the possession of the thing sold, and an instruction which goes further than the statute is *held* improper and misleading. *Ib.*

SCHOOLS. See ACTION, 1; CONTRACT, 1; MUNICIPAL CORPORATIONS, 1; TEACHERS, 1.

SECURITIES. See COLLATERAL SECURITIES, 1, 2.

SELLING LIQUOR. See CRIMINAL LAW, 4, 6, 7, 8; DRUGGISTS, 1, 2.

SHERIFF. See APPEALS, 1; JUSTICES' COURTS, 1; NOTICES, 1.

SLANDER.

1. CRIMINAL PROCEDURE—JOINDER OF PARTIES.—If several parties all give voice to the same utterance at the same time, or, if all concur in the utterance of one, they may be proceeded against jointly, as it is an entire offense—one joint act done by all,—and the more there are that join in it, the greater is the offense. *State v. Marlier*, 227.

2 ——— PLEADING—MATTER IN LANGUAGE IN WHICH SPOKEN.—The words alleged to be slanderous should be charged as spoken and in the tongue spoken. They should then, if spoken in a foreign language, be followed by a proper translation; and it is error to set out in the English language words spoken in the French language. *Ib.*

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3. WORDS CHARGED V. WORDS PROVED—RULE—INSTRUCTION.—The rule is, that the slander proved must substantially correspond with that charged in the petition. The words that contain the poison to the character and impute the crime must be proved as laid; and an instruction requiring the jury to believe from the evidence that the defendant spoke the words charged in the petition, "or enough of said words to constitute the charge that plaintiff was a thief," etc., is proper enough. *Baldwin v. Fries*, 288.

4. ——— PUNITIVE DAMAGES—CONSTITUTION—INSTRUCTION.—An instruction telling the jury that it might not only allow actual damages, but also such damages as will afford a wholesome example to others in like cases in the way of smart money or exemplary damages, etc., does not conflict with the constitutional provision that all penalties and forfeitures shall go into the school fund. *Ib.*

5. ——— CRIMINAL PROCEEDING—TWICE IN JEOPARDY—INSTRUCTION. In an action for slander an instruction authorizing punitive damages is not in conflict with the common-law maxim, *Nemo bis vexari pro eadem causa*, embodied in our bill of rights, to the effect that no one shall be twice in jeopardy of life or limb, by reason of the fact that defendant may be, or has been, criminally prosecuted for the same slander. *Ib.*

6. DAMAGES—PUNITORY OR EXEMPLARY—CRIMINAL PROSECUTION—MITIGATION.—Damages allowed in a civil case by way of punishment have no necessary relation to the penalty incurred for the wrong to the public, but are called punitive by way of distinction from pecuniary damages to characterize them as a punishment for the wrong done the individual; and in a civil suit to recover such damages, the fact that a penalty for the act has been inflicted in a criminal prosecution can in no way influence the damages in the civil action; though in such criminal prosecution the jury, in assessing the punishment, would be influenced by the fact that the party wronged had recovered vindictive damages for the same injury, and the verdict in the civil case can be introduced for the purpose of such mitigation. *Ib.*

7. EXEMPLARY DAMAGES—MALICE—INSTRUCTION.—An instruction, that if the jury believe that the defendant spoke the slanderous words charged in the petition, or enough of them to constitute the charge, that plaintiff was a thief, the law presumed malice in the speaking, and the jury without proof of malice or special damages were at liberty to give exemplary damages, is approved. *Ib.*

8. PLEADING JUSTIFICATION—MITIGATION—EVIDENCE.—Where neither justification nor mitigation is pleaded, evidence of mitigating circumstances is inadmissible. *Ib.*

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9. WORDS NOT CHARGED—REFUSED INSTRUCTION—HARMLESS ERROR. The refusal of an instruction that plaintiff could not recover on account of words shown in evidence, and not charged in the petition, is error; but in this case it is harmless error by reason of other evidence. *Ib.*

STATUTE OF LIMITATION. See QUANTUM MERUIT.

LIMITATION—FRAUD.—Where a girl, born a slave, has by the fraudulent conduct of her old master been induced to continue to labor for him in ignorance of her rights for twenty-four years after her emanicipation, the cause of action for such services, if any there is, accrues on the discovery of the fraud, her claim is an entirety for the whole, and the five years' limitation does not apply to bar all but the last five years' service. *Hickam v. Hickam*, 496.

STIPULATION. See DEPOSITIONS, 1; PRACTICE, TRIAL, 11.

ST. LOUIS, CITY OF. See JUSTICES' COURTS, 5; MUNICIPAL CORPORATIONS, 2.

TAX BILLS.

PLEADING—SPECIAL TAX BILL—GENERAL DENIAL—KANSAS CITY CHARTER. In an action to enforce a special tax bill under the charter of Kansas City, it is sufficient to plead the making and issue of the tax bill sued on, giving the date and contents thereof, and assignment thereof in case of assignment, filing the same, and allege that the party or parties made defendant own or claim to own the land charged, etc. The owner may plead in defense the imperfect character of the work, etc. Plaintiff does not have to allege or prove the work was well and faithfully done; and a general denial does not raise the question as to the character of the workmanship, which must be specifically alleged in the answer. *Guinotte v. Ridge*, 254.

TEACHERS.

1. PROFESSIONAL SERVICES—IMPLIED CONTRACT.—It is a rule applicable to every learned profession, and, therefore, to that of teaching, that he, who is engaged in the practice of it and is employed to render services appertaining to it, undertakes, in the absence of a special contract, to exercise a reasonable degree of skill and judgment and ordinary care and diligence in the rendition of such services. *Barngrover & Maack*, 407.

2. ——— EXTENT OF IMPLIED OBLIGATION.—This being the extent of the implied obligation, one who contracts to give instruction in specified studies does not warrant that he will pursue the best methods of study. *Ib.*

3. ——— SCHOOLROOM ACCOMMODATIONS.—But a teacher, who undertakes to furnish schoolroom accommodations, impliedly contracts that those furnished will be reasonably fit for the purposes for which they are intended. *Ib.*

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4. ——— PROSPECTUS.—The proprietor of a private school published a prospectus, in which he stated that the entire tuition would consist of three terms, and set forth the branches of study to be pursued during the first term of his school, and the course and extent of study and the number of lessons per week in each branch. *Held*, that he thereby undertook to instruct his pupils in each of the branches thus enumerated, but that the amount of instruction in each was, within reasonable limits, taking into consideration the time allotted for the entire course, left to his own judgment. *Ib.*

TENANT.

1. EJECTMENT—WRIT AGAINST THIRD PARTIES.—Where a tenant in possession is not made a party to an ejectment proceeding, his dispossession by force of the writ of restitution in such proceeding, is unlawful. *Oakes v. Aldridge*, 11.

2. ——— DAMAGES—END OF TERM.—The foreclosure of a mortgage on the leased premises, has the effect of ending a tenant's term; and in an action of forcible entry and detainer, in estimating the rents and profits of the tenant, the time calculated should not exceed the tenant's term; and though his term under his lease extends to March, yet, if the foreclosure takes place in the preceding August, his damage should not be calculated beyond that time. *Ib.*

TRAVELING SALESMAN.

PRINCIPAL AND AGENT—AUTHORITY OF TRAVELING SALESMAN.—A sale of goods made by a traveling salesman is not binding upon his principal, if it appears from the uncontradicted evidence that he was authorized merely to solicit or take orders for the goods, subject to the approval of the principal; and the instructions given to him by the principal are conclusive of the scope of his agency, if not enlarged by the ratification of the exercise of greater authority. *Bensberg v. Harris*, 404.

TROVER. See CONVERSION.

TRUSTEE OF EXPRESS TRUST. See CONSTRUCTION, 1.

VERDICT.

1. APPELLATE PRACTICE—SET ASIDE—PREJUDICE—REASONABLE AMOUNT.—Where a verdict is the evident result of prejudice, partiality or mistake, and not of that calm and considerate weighing of the facts in evidence which should always characterize the deliberations of a jury, the appellate court will not hesitate to interfere, but, in order to do this, the testimony and and surrounding circumstances must be such as to raise the strongest inference that such was the case. On the evidence in this case the amount of the verdict is deemed reasonable. *Duggan v. The Wabash Ry. Co.*, 266.

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2. RULE OF INTERFERENCE—EVIDENCE.—Whenever, from all the facts and circumstances in evidence, a jury may, without violence to the dictates of reason and common sense, infer a fact on account of its known relation to the facts proved, the court should not interpose its own different conclusion. The evidence in this case is reviewed in the light of the above and other rules in relation to interference with verdicts, and is found sufficient to sustain the verdict in this case. [ELLISON, J., *dissenting* in a separate opinion.] *Ib.*

3. SMALL FINDING NOT PREJUDICIAL ERROR.—The fact that the amount of the verdict might have been greater, under the evidence, is not prejudicial to the defendant in this case. *Collins v. Glass*, 297.

4. PRACTICE, TRIAL—EXCESSIVE VERDICT.—If a verdict is excessive under the instructions given by the court, the objection thereto on that ground will not be overcome by the fact that the instructions were erroneous, and that the verdict is not excessive under a correct rule as to the measure of damages. *Schmitz v. The St. Louis, etc., Ry. Co.*, 380.

5. ——— INCONSISTENCY OF VERDICT.—A verdict which is inconsistent in its several findings cannot stand, unless it appear that the party objecting to it has not been prejudiced. And *held*, accordingly, that the verdict in this cause could not stand, since by it the jury found for the plaintiff in a count for damages for the non-performance of a contract, and at the same time found for the defendant for the full contract price on a counterclaim, based upon the contract. *Johnson v. Labarge*, 433.

WARRANTY.

1. SALES—WARRANTY OF TITLE—EVIDENCE—CONVERSATION.—Plaintiff sued upon an implied warranty of title in the sale of a typewriter; defendant's contention was that it had given an option on the typewriter to A. who, before the time expired, sold it to plaintiff. It was undisputed that plaintiff gave his check to A., and, on his indorsement thereof to defendant, the latter paid him the difference between its price to him and his price to plaintiff. *Held*, the conversations between A. and defendant's agent—all the verbal acts of the parties connected with the transaction—should have been admitted in evidence to enable the jury to determine the question as to whom the sale was made by the defendant. *Clark v. People's Collateral Loan Co.*, 248.

2. ——— ——— INSTRUCTIONS—ISSUES.—Instructions set out in the opinion are criticised, since they nor any other instruction informed the jury what the issues were, and ignored the essential and constitutive fact that they must find that plaintiff had surrendered the typewriter to a person having a paramount title thereto. *Ib.*

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WASTE.

EVIDENCE.—The evidence in this case *held* to support a finding that there was imminent danger of the commission of waste, and justified the granting of an injunction. *Brown v. Miller*, 1.

WAIVER.

PRINCIPAL AND SURETY—WAIVER OF WRITTEN NOTICE TO SUE.—If a creditor, knowing one of his debtors to be a surety for the other, and that he is about to give him legal notice to bring suit, by his conduct prevents the notice from being given, which, if given and acted upon, would have caused the bringing of the suit and the collection of the note, discharges the surety, though no suit is brought, and the principal becomes insolvent. *Triplett v. Randolph*, 569.

WITNESSES.

1. CALLING UPON OPPOSITE PARTY TO TESTIFY—DEPOSITIONS.—If one party calls upon the other to testify, or reads in evidence a deposition taken by the opposing party, he, in either case, vouches for the credit of the witness. *Bensberg v. Harris*, 404.

2. COMPETENCY AS TO VALUES—CROSS-EXAMINATION.—If a witness says he knows the value of the articles in question, he can testify to such value. His means of knowledge will be proper subject for cross-examination. *Browne v. The Hartford Ins. Co.*, 473.

3. COMPETENCY OF CHILD.—The action of the trial court in permitting the six-year-old injured boy to testify is reviewed and and affirmed. *Buck v. The People's, etc., Co.*, 555.

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RULES GOVERNING PRACTICE

IN THE

KANSAS CITY COURT OF APPEALS.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

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RULE 5.—DIMINUTION OF RECORDS. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application.

RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any Circuit Court, or any other Court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the

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bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be appli cable to such fact or issue, and to except to the opinion of the court that the same tends to prove such fact or issue.

RULE 10.—EVIDENCE—BILL OF EXCEPTIONS TO BE ALLOWED, WHEN. If the Court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—EXCEPTIONS—QUESTIONS TO BE EMBODIED IN BILL. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—DUTY OF CIRCUIT COURT CLERKS IN MAKING TRANSCRIPTS. The Clerks of the several Circuit Courts and other Courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*): "*Summons issued on the —— day of ——, 188-, executed on the —— day of ——, 188-;*" and if any pleading be amended, the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain

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from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 13.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the Court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—BILL OF EXCEPTIONS IN EQUITY CASES. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—ABSTRACT AND BRIEFS TO BE FILED AND SERVED. In all cases the appellant or plaintiff in error shall file with the Clerk of this Court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing, in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or

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defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the record as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief as aforesaid, prepare, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and sidepaging shall be set forth.

RULE 17.—APPELLANT'S BRIEF TO ALLEGE ERRORS COMPLAINED OF. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior Court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless, for good cause shown, the Court shall otherwise direct.

RULE 18.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the Court, when the cause is called for hearing, will dismiss the appeal or writ of error, or,

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at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 19.—AGREED STATEMENT OF THE CAUSE OF ACTION. Parties may, in the Courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the Court thereupon and the exceptions saved to any ruling, which may intelligibly present to this Court the matters intended to be reviewed, and this statement, with a certificate by the Judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the Court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—MOTION FOR REHEARING. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question, decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the Court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—MOTION FOR AFFIRMANCE. On motion for affirmance, under Section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of

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itself be deemed good cause within the meaning of said law.

RULE 22.—EXTENDING TIME FOR FILING STATEMENTS, ABSTRACTS, ETC. In no case will extension of time for filing statements, abstracts and briefs eb granted, except upon affidavit showing satisfactory cause.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument, the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement, in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the Court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial Court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause filing a motion, either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the court that such notice has been given.

Attest:

F. C. FARR, *Clerk.*

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RULES OF PRACTICE

OF THE

ST. LOUIS COURT OF APPEALS.

REVISED OCTOBER 17, 1888.

TO BE IN FORCE NOVEMBER 1, 1888.

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room.

RULE 2.—MOTIONS. All motions in a cause shall be in writing, signed by counsel and filed for record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the law library, and to no other place, and then they must leave a written receipt therefor, but shall return such record to the Clerk's office within five days after taking the same.

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RULE 5.—DIMINUTION OF RECORD. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application. The Court may of its own motion, at any time, require the Clerk of the trial Court to send up a complete transcript, when the transcript of the record is formally insufficient.

RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any Circuit Court, or any other Court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court

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of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS DISALLOWED BY TRIAL COURT. If the Court of first instance shall be of opinion that there is no evidence tending to prove a particular issue or fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given, and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the trial Court.

RULE 11.—EXCEPTIONS TO ADMISSION OR EXCLUSION OF EVIDENCE. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—BILL OF EXCEPTIONS IN EQUITY CASES. In causes of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree on an abbreviated statement thereof.

RULE 13.—DUTY OF CLERKS IN MAKING OUT TRANSCRIPTS.—The Clerks of the several Circuit Courts and other Courts of first instance, before which a trial of any cause is had in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction in the cause*), in making out transcripts of the record for this Court,

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set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (*e. g.*): "*Summons issued on the —— day of ——, 188–, executed on the —— day of ——, 188–;*" and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter, touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 14.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions that it sets out all the evidence in a cause being that this Court may have before it the same matter which was decided by the Court of first instance, it shall be presumed as matter of fact in all bills of exceptions that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14*a*.—ABSTRACTS IN LIEU OF TRANSCRIPTS WHEN FILED AND SERVED. In those cases where the appellant shall, under the provisions of section 2253, Revised Statutes of 1889, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing, and shall in like time file four copies thereof with the Clerk of this Court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file four copies thereof with the clerk of this court. Objections to such complete or additional abstract shall be filed with the Clerk of this Court within five days after service of such abstract upon

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the appellant, and a copy of such objections shall be served upon the appellant in like time. [*To be in force from and after October 20, 1891.*]

RULE 14*b*.—COSTS FOR PRINTING ABSTRACTS AND RECORD. Costs will not be allowed either party for any abstract filed in lieu of a full transcript under section 2253, Revised Statutes, 1889, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. But in those cases brought to this court by a copy of the judgment, order or decree instead of a full transcript, and in which the appellant shall file in this court a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and, if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. [*To be in force from and after October 20, 1891.*]

RULE 15.—BRIEFS, WHEN TO BE FILED. In all civil cases the appellant, or plaintiff in error, shall file with the Clerk of the Court, at least one day before the cause is called for trial, four copies of a brief, containing: *First.* A clear and concise statement of the pleadings and facts shown by the record. *Second.* An enumeration in numerical order of the points or legal propositions made or relied on, accompanied by the citation of authorities supporting each proposition. *Third.* If he so elects, an argument supporting each proposition made or relied on.

The appellant, or plaintiff in error, shall also deliver a copy of said brief to the attorney of respondent, or defendant in error, at least ten days before the day on which the cause is called for hearing, and the respondent, or defendant in error, shall at least five days before the cause is called for hearing, deliver to counsel for appellant, or plaintiff in error, one copy of his brief, points

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and authorities cited, and such further statement as he may deem necessary, and shall file four copies thereof with the Clerk, at least one day before the case is called for hearing. Counsel for appellant, or plaintiff in error, if he so elects, may reply to such brief, by delivering a copy of his reply to counsel for respondent, or defendant in error, at least one day before the cause is called for hearing. The evidence of the service of such briefs and statements shall be filed with the Clerk before the day of hearing.

RULE 16.—BRIEFS AFTER SUBMISSION. After a cause has been submitted, or has been taken as submitted, no leave to file briefs will be granted, except upon good cause shown. Counsel obtaining such leave will be required to serve a copy of his brief on counsel on the other side, who shall have five days' time after such service to reply to the same. Evidence of such service shall be furnished, as required by the preceding rule.

RULE 17.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and sidepaging shall be set forth.

RULE 18.—APPELLANT'S BRIEF TO ALLEGE ERROR COMPLAINED OF. The brief filed on behalf of appellant, or plaintiff in error, shall distinctly and separately allege the errors committed by the inferior Court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 19.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant, or plaintiff in error,

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in any civil cause, shall fail to comply with the provisions of rule numbered 15, the Court, when the cause is called for hearing, will dismiss the appeal or writ of error, or at its discretion, continue or reset the cause, on proper terms. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 20.—AGREED STATEMENT OF CAUSE OF ACTION. Parties may, in the Courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the Court thereupon, and the exceptions saved to any rulings, which may intelligibly present to this Court the matters intended to be reviewed; and this statement, with a certificate by the Judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the Court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 21.—MOTIONS FOR REHEARING. Motions for rehearing must be founded upon statements showing clearly that some fact or question decisive of the cause, and duly presented by counsel in their brief, has been overlooked by the Court, or that the decision rendered is in conflict with an express statute or with a controling decision to which the attention of the Court has not been directed. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite party.

RULE 22.—MOTION FOR AFFIRMANCE. On motion for affirmance, under Section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of

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itself be deemed good cause within the meaning of said laws.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement; in each case, without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in the statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial Court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial Court, shall notify the adverse party or his attorney of record, by telegram, by letter or by written notice of his proposed proceeding. When said adverse party or his attorney of record resides in the city of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorn of record resides outside the city of St. Louis, twenty-four hours' additional notice for each one hundred miles shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

RULE 25.—APPEARANCE OF COUNSEL. The Counsel who represented the parties in the trial Court, in any cause coming to this Court, will be held to represent the

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same parties, respectively, in this Court; but, should other counsel be engaged, they must enter their appearance in writing, the counsel for the appellant, or the plaintiff in error, ten days, and the counsel for the respondent, or the defendant in error, five days, before the first day of the term to which the appeal or writ of error is returnable; and, if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party, to such appearance, be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the Clerk of this Court giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

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